91-178

No. _____

In The

Supreme Court of the United States

October Term, 1991

NICHKOL MELANSON,

Petitioner,

vs.

UNITED AIRLINES, INC.,
An Illinois Corporation

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

EDITH J. BENAY
Counsel of Record for Petitioner
345 Franklin Street
San Francisco, California 94102
Telephone: (415) 241-7286

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether state tort claims for pre-employment fraud and deceit which are "independent" of the terms of the Collective Bargaining Agreement and which do not require that the court "interpret" the terms of the Collective Bargaining Agreement are preempted under the Railway Labor Act, 45 U.S.C. § 151 et seq.

2. Whether state tort claims for pre-employment fraud and deceit which do not stem from representations regarding specific terms of the Collective Bargaining Agreement are preempted by the Railway Labor Act, 45 U.S.C. § 151 et seq.

3. Whether state tort claims for pre-employment fraud and deceit which stem from representations regarding terms of the Collective Bargaining Agreement are preempted by the Railway Labor Act, 45 U.S.C. § 151 et seq.

4. Whether state tort claims for fraud and deceit which arise from conduct occurring prior to the employment relationship are preempted by the Railway Labor Act, 45 U.S.C. § 151 et seq.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

I. THE FACTS 3

II. PROCEEDINGS BELOW 5

REASONS FOR GRANTING THE WRIT 8

I. THE NINTH CIRCUIT'S ANALYSIS OF RAILWAY LABOR ACT PREEMPTION OF STATE TORT CLAIMS CONFLICTS WITH THE PRINCIPLES OF LABOR LAW PREEMPTION ARTICULATED BY THIS COURT 8

A. THE SUPREME COURT HAS APPLIED THE SAME PRINCIPLES TO THE LMRA AND TO THE RLA 9

B. THIS CASE ADDRESSES PREEMPTION OF ISSUES REGARDING CLAIMS WHICH ARE *NOT* BASED ON REPRESENTATIONS OF SPECIFIC TERMS OF THE CBA AS WELL AS CLAIMS WHICH *ARE* BASED ON REPRESENTATIONS OF SPECIFIC TERMS OF THE CBA 11

TABLE OF CONTENTS – Continued

Page

C. THIS CASE RAISES A QUESTION OF STATUTORY INTERPRETATION WITH RESPECT TO WHETHER PRE-EMPLOYMENT FRAUD IS PREEMPTED BY THE RLA 13

II. THE NINTH CIRCUIT CONFLICTS WITH OTHER CIRCUITS REGARDING THE STANDARD FOR RAILWAY LABOR ACT PREEMPTION OF STATE TORT CLAIMS..... 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alexander v. Gardner-Denver Co., 415 U.S. 36 [94 S.Ct. 1011] (1974) 16

Allis Chalmers Corp. v. Luecke, 471 U.S. 202 [105 S.Ct. 1904] (1985) 11

Anderson v. Ford Motor Co., 803 F.2d 953 (8th Cir. 1986) *cert. denied*, 481 U.S. 1049 [107 S.Ct. 2181] (1987) 10

Atchison, Topeka and Santa Fe Ry Co., v. Buell, 480 U.S. 557 [107 S.Ct. 1410] (1987) 9, 15

Baldracchi v. Pratt & Whitney Aircraft Division, 814 F.2d 102 (2d Cir. 1987) 16

Beard v. Carrolton, 893 F.2d 117 (6th Cir. 1989) 15

Berda v. CBS Inc., 881 F.2d 20 (3rd Cir. 1989) *cert. denied*, ___ U.S. ___ [110 S.Ct. 879] (1990) 9

Coppinger v. Metropolitan-North Commuter R.R., 861 F.2d 33 (2d Cir. 1988) 16

Dougherty v. Parsec Inc., 872 F.2d 766 (6th Cir. 1989) 15

Edelman v. Western Airlines, Inc., 892 F.2d 839 (9th Cir. 1989) 7

J.I. Case Co. v. NLRB, 321 U.S. 332 [64 S.Ct. 576] (1944) 7, 8

Jackson v. Consolidated Rail Corp., 717 F.2d 1045 (7th Cir. 1983) *cert. denied*, 465 U.S. 1007 [104 S.Ct. 1000] (1984) 14

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 [108 S.Ct. 1877] (1988) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir. 1977) *cert. denied*, 439 U.S. 930 [99 S.Ct. 318] (1978) 7

McAlester v. United Air Lines, Inc., 851 F.2d 1249 (10th Cir. 1988) 16

Melanson v. United Airlines, 931 F.2d 558 (9th Cir. 1991) 6, 7, 11, 12, 14

Merchant v. American S.S. Co., 860 F.2d 204 (6th Cir. 1988) 14

Pan American World Airways v. Puchert, 472 U.S. 1001 [105 S.Ct. 2693] (1984) 15

Pennsylvania R.R. v. Day, 360 U.S. 548 [79 S.Ct. 1322] (1958) 13

Wells v. General Motors Corp., 881 F.2d 166 (5th Cir. 1989) *cert. denied*, ___ U.S. ___ [110 S.Ct. 1959] (1990) 10

FEDERAL STATUTES

28 U.S.C. § 1331 2

28 U.S.C. § 1332 2

29 U.S.C. § 185 ..... 3, 8

42 U.S.C. § 1981 16

42 U.S.C. § 1983 16

45 U.S.C. § 151 ..... 3, 5, 8

45 U.S.C. § 185 ..... 3, 6, 10, 11

STATE STATUTES

Cal. Civ. Code § 1709 ..... 2, 5, 9, 12

Cal. Civ. Code § 1710 ..... 2, 5, 9, 12

No. _____

In The

Supreme Court of the United States

October Term 1991

NICHKOL MELANSON,

Petitioner,

vs.

UNITED AIRLINES, INC.,
An Illinois Corporation,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Nichkol Melanson respectfully prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Ninth Circuit entered on April 24, 1991.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 931 F.2d 558. This decision appears in the Appendix, *infra*. (App. 1.) The Order of the United States District Court for the Northern

District of California granting United Airlines' Motion to Dismiss is not published. It appears in the Appendix, *infra*. (App. 14)

JURISDICTION

Invoking federal question jurisdiction pursuant to 28 U.S.C. § 1331 United Airlines filed a petition for removal of this action to the United States District Court for the Northern District of California on November 14, 1988. Invoking diversity jurisdiction pursuant to 28 U.S.C. § 1332 United Airlines filed a supplemental petition for removal on December 19, 1988. On March 24, 1989 the United States District Court for the Northern District of California granted United Airlines' motion for dismissal and ordered entry of judgment as requested in said motion on April 12, 1989. Judgment was entered on April 14, 1989.

The decision of the United States Court of Appeals for the Ninth Circuit was issued on April 24, 1991. No petition for rehearing was sought. This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254 subdivision (1).

STATUTES INVOLVED

The texts of the following statutes appear in the Appendix.

1. California Civil Code § 1709 (App. 30)
2. California Civil Code § 1710 (App. 30)

3. § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (App. 28)

4. Title I, § 1 of the Railway Labor Act, 45 U.S.C. § 151 (App. 16)

5. Title I, § 2 of the Railway Labor Act, 45 U.S.C. § 151a (App. 18)

6. Title I, § 5 of the Railway Labor Act, 45 U.S.C. § 155 (App. 19)

9. Title II, § 201 of the Railway Labor Act, 45 U.S.C. § 181 (App. 24)

10. Title II, § 202 of the Railway Labor Act, 45 U.S.C. § 182 (App. 24)

11. Title II, § 204 of the Railway Labor Act, 45 U.S.C. § 184 (App. 25)

12. Title II, § 205 of the Railway Labor Act, 45 U.S.C. § 185 (App. 26)

STATEMENT OF THE CASE

I. THE FACTS

In late 1985 United Airlines (United) acquired Pan American Airlines' (Pan Am) Pacific routes. As a condition of the acquisition 1202 Pan Am flight attendants had to voluntarily transfer to United by February 11, 1986. Appellant Melanson had been a flight attendant for nearly twenty-two years and was one of those whom United recruited. In this action Melanson alleges that she was induced to transfer by United's representations that the height and weight standards for United flight attendants would be "waived" for Pan Am transferees. Melanson, who had gained weight from hormone treatments for infertility, also alleges that she was told that United

authorized medical exceptions for flight attendants who were on medication.

What United failed to disclose was that it was "waiving" the weight standards for *hiring* purposes only, but would require strict compliance for purposes of *continued employment*. United also failed to disclose that medical exceptions were only authorized for flight attendants taking medication for life threatening diseases.

Prior to her transfer Melanson had informed United that she was gaining weight from the hormone treatments and she informed United that she would not transfer if she were subject to weight requirements that would jeopardize those treatments. Melanson was told, through United agents, that United did not care about her weight and she was hired in spite of the fact that she was overweight by United's standards.

In recruiting Pan Am transferees United communicated directly with the flight attendants. Neither the union which represented Pan Am employees nor the union which represented United employees, took part in the recruitment process.

Within six months of becoming a United employee Melanson was suspended without pay and was forced to stop the hormone treatments in order to lose enough weight to avoid termination.

Melanson and several other Pan Am transferees grieved their suspensions under the "minor dispute" provisions of the RLA, as " . . . unreasonable and arbitrary

application of its [United's] weight program." The arbitrator found that the weight program, which is incorporated into the CBA, was being properly applied. However, due to United's representations during the recruitment process, the arbitrator allowed certain exceptions for the grievants.

On or about September 2, 1988 Melanson filed suit in California Superior Court for the City and County of San Francisco alleging negligent or intentional misrepresentation, concealment and promise without intent to perform. All three theories of fraud and deceit are codified under Cal. Civ. Code §§ 1709 and 1710 (App. 30).

II. PROCEEDINGS BELOW

On November 14, 1988 United removed Melanson's action to the United States District Court for the Northern District of California asserting federal question jurisdiction. On November 19, 1988 United filed a supplemental petition for removal asserting diversity jurisdiction. Melanson did not seek remand.

On March 24, 1989 the United States District Court for the Northern District of California granted United's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b), on the ground that Melanson's claims were preempted by the Railway Labor Act 45 U.S.C. § 151 et seq. Judgment was entered on April 14, 1989. Melanson appealed the judgment to the United States Court of Appeals for the Ninth Circuit. On April 24, 1991, after oral argument, the court of appeals affirmed the district court's dismissal.

The court of appeals held that all three of Melanson's state law claims would "intrude" upon the collective bargaining system established under the Railway Labor Act. *Melanson v. United Airlines*, 931 F.2d 558, 563 (9th Cir. 1991). (App. 11).

The court of appeals did not find that the theory of "promise without intent to perform" required interpretation of the Collective Bargaining Agreement (CBA). However, it did find that this claim could not be litigated without "reference" to the CBA because, " . . . as a practical matter, proof of United's intent not to perform and its nonperformance lead inevitably to the CBA." *Melanson, Id.* at p.563. (App. 10).

The court of appeals found that in order to prevail on her "misrepresentation" theory, Melanson would have to show that the relevant provisions of the CBA differ significantly from United's representations regarding the weight program. This would require what the court characterized as "reference to and interpretation of the terms of the CBA," making the alleged tortious activity " . . . at least 'arguably governed' by the CBA." *Melanson, Id.* at 562-563. (App. 9).

In order to prevail on her "concealment" theory, the court of appeals found that Melanson would have to compare United's representations to the relevant portions of the weight program. This would also require "reference to and interpretation of the CBA." *Melanson, Id.* at 563. (App. 9-10).

The Ninth Circuit declined to apply, by analogy, cases discussing preemption under § 301 of the Labor-Management Relations Act (LMRA), 42 U.S.C. § 185, on

the ground that the narrower test for § 301 preemption, under *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), is not necessarily determinative of preemption under the RLA. Therefore, rather than consider whether Melanson's tort claims were "independent" of the CBA, the court reviewed Melanson's claims to determine whether they were "minor disputes" under the RLA. The court of appeals defined "minor disputes" as disputes which "concern the interpretation or application of" the CBA, *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 843 (9th Cir. 1989), and are "inextricably intertwined with the grievance machinery of" the CBA or the RLA, quoting *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367.

The court did find that Melanson's tort claims were not the subject of a prior arbitration procedure, brought under the "minor disputes" provisions of the RLA. The grievances brought by Melanson and other Pan Am transferees alleged unreasonable and arbitrary application of the weight program, while in this action Melanson alleges that United fraudulently induced her to transfer by misrepresenting that the weight requirements would be waived in her case. *Melanson*, 931 F.2d at 562 (App. 5-6).

The court rejected Melanson's argument that her tort claims were not preempted because she was not an employee when the representations in question were made. The court of appeals declined to hold that claims arising from conduct occurring prior to the commencement of a formal employment relationship are automatically screened from the preemptive force of the RLA, relying on *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337-39 (1944) for the proposition that the CBA supersedes inconsistent individual employment contracts. The court

extended this reasoning beyond contract claims on the ground that nearly any contract claim can be restated as a tort claim. *Id.* 561 (App. 4).

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S ANALYSIS OF RAILWAY LABOR ACT PREEMPTION OF STATE TORT CLAIMS CONFLICTS WITH THE PRINCIPLES OF LABOR LAW PREEMPTION ARTICULATED BY THIS COURT.

Certiorari should be granted in this case because it addresses several important issues regarding preemption of state tort claims by the Railway Labor Act (RLA), 45 U.S.C. § 151 et seq.

Appellant Melanson states fraud and deceit claims based on pre-employment representations made by United Airlines. The primary issue is whether the same principles for determining preemption of state tort remedies should be applied to § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and to the RLA.

The facts of this case raise that issue from the perspective of claims which are not based on representations regarding specific terms of the CBA; claims which are based on representations regarding specific terms of the CBA and claims which did not arise from conduct which occurred within the employment relationship.

The Supreme Court Has Applied The Same Principles To The LMRA And To The RLA

The Supreme Court has not dealt directly with the issue of RLA preemption of "independent" state law remedies but it has articulated a theory of the limits of federal labor law preemption which it has applied to both the LMRA and the RLA. Both in *Atchison, Topeka and Santa Fe Ry Co. v. Buell,* 480 U.S. 557 [107 S.Ct. 1410] which addressed RLA preemption of Federal Employee Liability Act claims, and in *Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 399 [108 S.Ct. 1877] which addressed § 301 preemption of state tort claims, this Court has said:

> This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. (citations omitted.) Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, different considerations apply *where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.*

Lingle, 486 U.S. at 406 [108 S.Ct. at 1884].

Melanson's claims do not arise out of statutes specifically designed to protect workers, but her claims do arise out of statutes designed to provide minimum substantive guarantees to all citizens. Cal.Civ.Code §§ 1709 & 1710 (App. 30). Several circuits have held that state tort claims for fraud, which were "independent" of the Collective Bargaining Agreement (CBA) were not preempted by § 301. *See, e.g. Berda v. CBS Inc.,* 881 F.2d 20 (3rd Cir. 1989) *cert. denied,* ___ U.S. ___ [110 S.Ct. 879] (1990), (plaintiff need only establish that CBS' agents promised he

would not be laid off for a reasonable period of time although they knew or were reckless in not knowing that CBS was planning a reduction in force that would affect him); *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989) *cert. denied*, ___ U.S. ___ [110 S.Ct. 1959] (1990), (examination of the terms of a severance agreement in order to determine what the *truthful* representations should have been, established relevance of the agreement but not necessarily substantial dependence for preemption purposes); *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986) *cert. denied*, 481 U.S. 1049 [107 S.Ct. 3242] (Proof that Ford fraudulently induced employment by misrepresenting that new hirees would not be "bumped" by "preferential hirees" does not depend on the existence of any contractual relationship nor do the standards for judging fraudulent misconduct derive from any contractually established expectations of the parties).

To date, there has been nothing in this Court's treatment of either § 301 or the RLA to suggest that the two statutes should not be subject to the same basic principles for determining preemptive effect on state torts. Indeed, both the standard articulated in *Lingle* for § 301 preemption and Title II, § 205 of the RLA, 45 U.S.C. § 185 (App. 26) preempt claims which require "interpretation" of the CBA. In this case, however, the Ninth Circuit did not confine the RLA to preemption of state torts which require "interpretation." As used by the Supreme Court in *Lingle*, "interpretation" means that " . . . pertinent principles of state law required construing the relevant collective bargaining agreement." *Lingle*, 486 U.S. at 404 ftnt. 7 [108 S.Ct. at 1882 ftnt. 7].[1]

---

[1] The Ninth Circuit's holding in this case was not based on either "application of the CBA," or "inextricably intertwined

(Continued on following page)

B. This Case Addresses Preemption Issues Regarding Claims Which Are *Not* Based On Representations Of Specific Terms Of The CBA As Well As Claims Which *Are* Based On Representations Of Specific Terms Of The CBA

Melanson alleges that United promised it would "waive" the weight program for Pan Am flight attendants. Fraud and deceit claims based on this allegation do not stem from any representations about specific terms of the weight program and do not require that the court "interpret" the CBA. At most, the court would make a "tangential reference" to the CBA when comparing United's representations to its subsequent conduct. *See Allis-Chalmers Corp. v. Luecke*, 471 U.S. 202, at 211, [105 S.Ct. 1904, at 1911] (1985).

Melanson also alleges that during the recruitment period United misrepresented that the medical exception was available to all flight attendants taking medication. United subsequently denied Melanson's request for a medical exception on the ground that the exception was limited to medications for life threatening diseases. This

---

(Continued from previous page)

with the grievance procedure." 45 U.S.C. § 185. The court did not use either of those terms in stating its reasons for preemption. Furthermore, the court found that Melanson's claims had not previously been arbitrated because the issue put before the System Board of Adjustment was "*misapplication* of a work rule" (emphasis added) whereas in this case Melanson claimed that United fraudulently induced her to transfer to United Airlines by misrepresenting that weight requirements would be waived in her case. *Melanson*, 931 F.2d at 561.

allegation raises fraud and deceit claims based on representations regarding a specific term of the weight program, which is incorporated into the CBA.

Although these two allegations of misrepresentation raise different issues with regard to RLA preemption of state torts, neither allegation requires "interpretation" as defined by the Supreme Court in *Lingle v. Norge*. As in *Lingle* the inquiry is purely factual, pertaining to the conduct and motivation of the employee and the employer. *Lingle*, 486 U.S. at 404, [108 S.Ct. at 1882].

The Ninth Circuit declined to follow *Lingle* in this case and imposed a significantly broader preemptive standard on the RLA than the Supreme Court did on § 301. For example, the Ninth Circuit found that Melanson's claim of "promise without intent to perform" was preempted by the RLA although it did not find that this claim required "interpretation" of the CBA. *Melanson*, 931 F.2d at 563.

The Ninth Circuit did find that Melanson's claims of "negligent or intentional misrepresentation" and "concealment" require "reference to and interpretation of the terms of the CBA" *Id.*, 563 but in this case "interpretation" does not mean what it meant in *Lingle*, that the " . . . pertinent principles of state law required construing the relevant collective bargaining agreement." *Lingle*, 486 U.S. at 404 ftnt. 7 [108 S.Ct. at 1882 ftnt. 7]. Cal.Civ. Code Sections 1709 and 1710 do not hold a defendant liable for misrepresentation or concealment of *the court's* interpretation of the CBA. To the extent that "resolution of the dispute," refers to the CBA, the relevant inquiry will be into United's *own* interpretation of the weight program at

the time it made the representations in question, regardless of whether the court would have "construed" it the same way. It is United's interpretation, not the court's, that will determine whether United misrepresented or concealed a material fact, or made a promise it had no intention of performing.

C. This Case Raises a Question of Statutory Interpretation With Respect to Whether Pre-Employment Fraud is Preempted by the RLA

This case also presents a third issue regarding RLA preemption. Melanson's claims of "misrepresentation," "concealment" and "promise without intent to perform" grow out of United's *pre-employment* conduct. The Railway Labor Act is expressly limited to conflicts between employer and employee. The Supreme Court has extended preemption to claims brought *after* employment, when " . . . the claim itself arises out of the employment relationship which Congress regulated." *Pennsylvania R.R. v. Day*, 360 U.S. 548, 551-52 [79 S.Ct. 1322, 1324-5]. However, a claim based on pre-employment conduct does not arise out of the employment relationship.

The Court of Appeals for the Ninth Circuit held that Melanson's employment status was not determinative because the effect on the federal labor scheme of allowing individual agreements that conflict with the CBA would be the same even if the agreement was reached prior to employment. However, in this action Melanson does not seek to enforce a separate agreement.

The Ninth Circuit rejected this distinction on the ground that nearly any contract claim can be restated as a

tort claim. *Melanson*, 931 F.2d at 561 (App. 5). However, although they may be based on the same or similar facts, the two kinds of claims have a very different impact on the federal labor scheme. Conflicting agreements could affect the orderly functioning of the labor force, but holding an employer financially accountable for its tortious conduct, could not.

II.

THE NINTH CIRCUIT CONFLICTS WITH OTHER CIRCUITS REGARDING THE STANDARD FOR RAILWAY LABOR ACT PREEMPTION OF STATE TORT CLAIMS

The similarity between the standards for preemption under the RLA and § 301 of the LMRA is highlighted by the decisions and the *dictum* of various circuits.

Prior to the decision in *Lingle*, the Seventh Circuit held that a state tort action for retaliatory termination was preempted by the RLA because the defense would be based on good cause for termination. *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 [104 S.Ct. 1000] (1984). More recently, however, the Court of Appeals for the Sixth Circuit observed, in *dictum*, that the reasoning employed in *Jackson* has been repudiated by the Supreme Court's decision in *Lingle*. *Merchant v. American S.S. Co.*, 860 F.2d 204, 208 (6th Cir. 1988). In *Merchant* the court also observed, in *dictum*, that the Supreme Court's preemption analysis in *Buell*, would not have been different if the putative tort claim had arisen under state law rather than federal law. *Merchant*, 860 F.2d at 209.

The Court of Appeals for the Sixth Circuit has turned its analysis of preemption of state torts on whether breach of contract is an essential element of the state tort. In so doing it has not distinguished between § 301 and the RLA. In *Beard v. Carrolton*, 893 F.2d 117 (6th Cir. 1989) the court held that the Appellant's tort claim for wrongful interference with contract was preempted by the RLA " . . . because Kentucky makes breach of contract an essential element of the tort." (citations omitted.) *Beard, Id.*, at 122. The court distinguished its decision in *Dougherty v. Parsec Inc.*, 872 F.2d 766 (6th Cir. 1989) on the ground that Ohio law does not require breach of contract as an essential element. Although the court speculated that "The standards under the two statutes [§ 301 and the RLA] *may* not be identical," (emphasis added) no distinction was made in the court of appeals' analysis. *Beard*, 893 F.2d at 122.

The Court of Appeals for the Second Circuit has also analyzed § 301 and RLA preemption interchangeably. That court relied on the Supreme Court's decision in *Pan American World Airways v. Puchert*, 472 U.S. 1001, 105 S.Ct. 2693, (1985) when it said, in *dictum* that the RLA does not preempt all state law claims for retaliatory discharge. *Puchert* was a decision by the Supreme Court of Hawaii, holding that a state prohibition of discharge in retaliation for filing a worker's compensation claim was not preempted by the RLA. The United States Supreme Court dismissed the appeal for want of federal question jurisdiction. As interpreted by the Court of Appeals for the Second Circuit, "If the Hawaii law were preempted by the RLA the case would necessarily have presented the

Court with a substantial federal question." *Baldracchi v. Pratt & Whitney Aircraft Div.*, 814 F.2d 102 (2d Cir. 1987).

The Court of Appeals for the Second Circuit has also held that a federal civil rights claim under 42 U.S.C. § 1983 is not preempted by the RLA because the civil rights claim has " 'a legally independent origin' " even when dismissal was upheld in RLA arbitration proceedings. *Coppinger v. Metro-North Commuter R.R.*, 861 F.2d 33, 36 (2d Cir. 1988), quoting from *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1973). Similarly, the Court of Appeals for the Tenth Circuit has held that the RLA does not preempt a claim of racial discrimination under 42 U.S.C. § 1981, in spite of the fact that the claim was based on the airline's disciplinary actions. *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249 (10th Cir. 1988).

III.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. The Ninth Circuit's ruling extends the preemptive effect of the RLA well beyond the preemptive effect of § 301, and would deprive employees of air carriers and railroads of any forum for claims based on the fraudulent conduct of their employers.

Respectfully submitted,

EDITH J. BENAY
Counsel of Record for Petitioner
345 Franklin Street
San Francisco, California 94102
Telephone: (415) 241-7286

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICHKOL MELANSON, *Plaintiff-Appellant,* v. UNITED AIR LINES, INC., *Defendant-Appellee.*	No. 89-15566 D.C. No. CV-88-4551-CAL OPINION

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted
June 6, 1990 – San Francisco, California

Filed April 24, 1991

Before: William C. Canby, Jr., John T. Noonan, Jr. and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Canby

OPINION

CANBY, Circuit Judge:

Appellant Nichkol Melanson appeals the dismissal of her state law tort action against United Air Lines, Inc. ("United") for negligent and intentional misrepresentation, concealment, and promise without intent to perform. Melanson originally filed this action in state court, but United removed it to federal court, asserting diversity jurisdiction under 28 U.S.C. § 1332 and federal question jurisdiction under 28 U.S.C. § 1331 and 45 U.S.C. § 151. United then moved to dismiss the case. The district court

granted United's motion, finding that Melanson's claims are preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.* We affirm.

FACTS

In 1985, United purchased the Pacific division of Pan American Airlines ("Pan Am"). As part of the acquisition, United agreed to hire 1202 of Pan Am's flight attendants to work the newly acquired routes. In September, 1985, the Association of Flight Attendants ("AFA") opened negotiations with United over employment conditions for the transferring flight attendants. A few weeks later, United notified the flight attendants of the acquisition and invited them to transfer to United. United also informed the flight attendants that work rules and seniority integration covering their new employment at United were being negotiated with the AFA, and sent them a description of United's weight requirements for flight attendants. In December, 1985, the AFA ratified the collective-bargaining agreement ("CBA") which included the terms and conditions for the transfer of employees from Pan Am to United. The weight program is incorporated in the CBA as a term and condition of employment between United and members of the bargaining unit.

Melanson was among those Pan Am flight attendants eligible to transfer to United. She had served as a flight attendant for nearly twenty-two years. She alleges that United, while recruiting her, indicated that the weight requirements would not apply to the transferring flight attendants. At the time, Melanson was undergoing hormone treatment for infertility that caused her to gain

weight. She disclosed this fact to United and informed the company that she would not transfer if she were subject to weight requirements that would jeopardize her infertility treatment. Through its agents, United assured Melanson that it was not concerned with her weight. In reliance upon this representation, Melanson transferred to United.

Shortly after Melanson became a United employee, she was suspended without pay for fourteen months for failing to comply with United's weight policy. At the time of her suspension, Melanson was a bargaining unit employee covered by the CBA. Along with other flight attendants, Melanson brought a complaint regarding the application of United's weight program in her case before the System Board of Adjustment ("Board") as required by the CBA and the RLA, 45 U.S.C. § 184. After a hearing, the Board reinstated Melanson and awarded her back pay, but required her to submit to an individualized weight program. Melanson then stopped her infertility treatments in order to lose weight to avoid termination. This action followed.

DISCUSSION

A. Standard of Review

We review *de novo* the district court's dismissal of Melanson's claims and its statutory interpretation of the RLA. *See Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307, 1309 (9th Cir.), *cert. denied*, 111 S. Ct. 386 (1990); *Lewy v. Southern Pacific Transp. Co.*, 799 F.2d 1281, 1286 (9th Cir. 1986). In reviewing the dismissal granted under Fed. R.

Civ. P. 12(b)(6), we accept as true the allegations of Melanson's complaint. *Grote*, 905 F.2d at 1308 n.1.

B. The Effect of Melanson's Employment Status

Melanson first argues that because she was not an employee of United when first informed that she would not be subject to United's weight program, this dispute did not arise within an employment context and is not covered by the CBA or the RLA. We decline to hold that claims arising from conduct occurring prior to the commencement of a formal employment relationship are automatically screened from the preemptive force of the RLA.

Through the federal labor scheme, Congress has established a system of collective bargaining. Allowing an employee or employer, by virtue of an individual agreement, to establish an employment status different from that of other employees would undermine the efficacy of collective bargaining. Accordingly, the Supreme Court has ruled that the CBA supersedes inconsistent individual employment contracts. *See J.I. Case Co. v. NLRB*, 321 U.S. 332, 337-39 (1944); *see also Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346-47 (1944) (The principles of *J.I. Case Co.* apply in the RLA context). The effect on the federal labor scheme of allowing individual agreements that conflict with the CBA would be the same whether the agreement is reached prior to or during a formal employment relationship. The timing of the agreement or alleged tortious act, then, is

not necessarily determinative.[1] It is the relationship of the claim to the CBA, regardless of the plaintiff's employment status, that guides the preemption analysis. The pertinent question, therefore, is whether Melanson's claims are preempted.[2]

C. Effect of Prior Arbitration

United argues that Melanson's claim was the subject of a prior arbitration procedure and cannot be raised again in this action. We disagree. The issue before the Board was:

> Whether the company ha[d] violated the Collective Bargaining Agreement by imposing discipline, up to and including termination, on several of [the] former Pan Am flight attendants, through an unreasonable and arbitrary application of its weight program . . . .

---

[1] This reasoning is not limited to contract claims. Nearly any contract claim can be restated as a tort claim. The RLA's grievance procedure would become obsolete if it could be circumscribed by artful pleading. *See Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).

[2] Melanson also contends that the CBA did not apply to her at the time of the alleged misrepresentation because the AFA did not represent her in the CBA negotiations until she became a United employee and joined the AFA. This argument is without merit. The Supreme Court has stated that "[t]he labor organization chosen to be the representative of the craft or class of employees is . . . chosen to represent all of its members, regardless of their union affiliations or want of them." *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 200 (1944).

Decision of the System Board of Adjustment, Application of United Weight Program to Former Pan American Flight Attendants 1 (Jan. 16, 1988). The issue in this appeal, however, is different. Rather than alleging a misapplication of a work rule, as she did before the Board, Melanson argues here that United fraudulently induced her to transfer by misrepresenting that the weight requirements would be waived in her case. This issue was not fully litigated before the Board. Again, the real question is whether Melanson's claims are preempted by the RLA.

D. Preemption

Congress enacted the RLA to promote stability in labor-management relations by providing a framework for resolving labor disputes in the railroad industry. *See Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 562 (1987). Title II of the RLA extends the RLA's coverage to the airline industry. 45 U.S.C. § 181. Congress specifically intended the RLA to keep airline labor disputes out of the courts. *See Lewy*, 799 F.2d at 1289. Consequently, the RLA provides for mandatory administrative grievance procedures as the exclusive remedy in claims arising from "minor disputes" under collective-bargaining agreements. *See Andrews v. Louisville & N. R. Co.*, 406 U.S. 320, 322-23 (1972). "Minor disputes" are the "grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions." *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 94 (1978). We have also defined "minor disputes" as those which are "arguably" governed by the CBA or have a "not

obviously insubstantial" relationship to the labor contract, *Magnuson*, 576 F.2d at 1369-70, "are 'inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the RLA,' " *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 843 (9th Cir. 1989) (quoting *Magnuson*, 576 F.2d at 1369), or which involve the interpretation of a current collective-bargaining agreement. *See International Association of Machinists & Aerospace Workers v. Republic Airlines*, 761 F.2d 1386, 1390 (9th Cir. 1985); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983).

In resisting preemption, Melanson asks us to apply, by analogy, cases discussing preemption under § 301 of the Labor-Management Relations Act, 42 U.S.C. § 185. She cites *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) in support of her argument that state law remedies "independent" of the CBA are not preempted by § 301. *Lingle* held that claims are "independent" when "the state-law claim can be resolved without interpreting" the collective bargaining agreement. *Id.* at 410. We have made clear, however, that the narrower test for § 301 preemption under *Lingle* is not necessarily determinative of preemption under the RLA because "preemption under the RLA is broader than under § 301." *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307, 1310 (9th Cir. 1990). Thus, some claims that might escape preemption under *Lingle* and § 301 may nevertheless by preempted under the RLA.[3]

---

[3] An example of the distinction may be drawn from two cases that predate *Lingle*. Melanson relies in part on *Tellez v.*

(Continued on following page)

We therefore review Melanson's claims to determine whether they are "minor disputes" under the RLA; that is, whether they " 'concern the interpretation or application of' " the CBA. *Edelman*, 892 F.2d at 843 (quoting *Int'l Ass'n of Machinists v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985)). A claim is also considered a "minor dispute" if it is " 'inextricably intertwined with the grievance machinery of' " the CBA or RLA. *Id.*, (quoting *Magnuson*, 576 F.2d at 1360).

Melanson asserts three theories under California law which comprise her cause of action for fraud: 1) negligent or intentional misrepresentation; 2) concealment; and 3) promise without intent to perform. To prevail on her misrepresentation theory, Melanson must show, *inter alia*, that United made a false representation of material fact. *See Univeral [sic] By-Products, Inc. v. City of Modesto*, 43

(Continued from previous page)

Pacific Gas & Elec. Co., 817 F.2d 536, 538-39 (9th Cir.), *cert. denied*, 484 U.S. 908 (1987). In *Tellez*, we found that section 301 did not preempt claims of defamation and intentional infliction of emotional distress because the claims arose from the employer's distribution of a letter alleging that the plaintiff had bought cocaine on the job. We held that the claims could be resolved without reference to the CBA.

Tellez is to be contrasted with *Beers v. Southern Pacific Transp. Co.*, 703 F.2d 425, 428-29 (9th Cir. 1983), in which we held that the RLA preempted a state law claim for intentional infliction of emotional distress arising from harassment on the job, because the claim could have been made the subject of RLA grievance arbitration.

As we point out later in the text, however, Melanson's claims do not even meet the standard of *Tellez;* they cannot be resolved without reference to the CBA.

Cal.App.3d 145, 151, 117 Cal. Rptr. 525, 528 (1974); Cal. Civ. Code §§ 1709, 1710. To demonstrate the falsity of United's alleged representations regarding its weight program, Melanson must show that the relevant provisions of the CBA differ significantly from those representations. This showing requires reference to and interpretation of the terms of the CBA. Resolution of this misrepresentation claim, then, depends on an analysis of the CBA, and the alleged tortious activity is at least "arguably governed" by the CBA. Therefore, the district court properly dismissed Melanson's misrepresentation claim as preempted.

The elements of Melanson's second fraud claim, concealment, are: 1) suppression of material fact; 2) by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; 3) with intent to deceive a person unaware of the concealed fact and who would not have acted had he known of the fact. Cal. Civ. Code §§ 1709, 1710. Melanson contends that United improperly concealed its intention to waive its weight requirements for hiring purposes only and to reinstate the program once the new flight attendants were hired. She also alleges that United fraudulently concealed the fact that medical exceptions to the weight program were limited to life-threatening situations and did not extend to weight gain caused by medication or medical treatment.

To determine whether United concealed a material fact from Melanson requires a comparison of United's representations to Melanson with the terms of the weight program in the CBA. Thus, as the misrepresentation

claim, this claim requires reference to and interpretation of the CBA. Melanson's concealment claim is preempted.

Melanson's final fraud theory under California law is promise without intent to perform. To establish this claim, Melanson must prove that United made a promise about a material matter, with no intention of honoring that promise, that induced her to take action she otherwise would not have taken. *See* Cal. Civ. Code §§ 1709, 1710, *see also Cicone v. URS Corp.*, 183 Cal.App.3d 194, 203, 227 Cal. Rptr. 887, 892 (1986); *Miller v. National American Life Ins. Co. of California*, 54 Cal.App.3d 331, 338, 126 Cal. Rptr. 731, 734 (1976). "A promise to do something necessarily implies the intention to perform, and where such intention is absent, there is an implied misrepresentation of fact, which is actionable fraud." 5 B. Witken, Summary of California Law § 685 (9th ed. 1988).

This claim presents a somewhat closer question, but we conclude that Melanson cannot prove the elements of this claim without reference to the CBA or to conduct governed by the CBA and its grievance machinery. It is true that the representations United made to Melanson and her reliance on those representations can be established without reference to the CBA. But as a practical matter, proof of United's intent not to perform and its nonperformance lead inevitably to the CBA. The weight standards that United enforced are incorporated into the CBA. That enforcement constituted the repudiation of United's alleged promise to Melanson, and it is that repudiation that permits the trier of fact to infer that United never intended to perform its promise to Melanson. "The subsequent repudiation relates back to the original promise." *Cicone v. URS Corp.*, 183 Cal.App.3d 194, 203, 227

Cal.Rptr. 887, 892 (1986). If the CBA in fact guaranteed Melanson an exemption from the weight requirements, her claim would clearly be affected, if not defeated. Her claim can scarcely be litigated without reference to the CBA.

All three of Melanson's state law claims would intrude, then, upon the collective bargaining system established by Congress under the RLA. Even under the narrower preemption test of section 301, we held similar claims preempted in *Bale v. General Telephone Co. of California*, 795 F.2d 775 (9th Cir. 1986). There, two workers claimed fraud and misrepresentation by the employer in representing that they, as temporary employees, would obtain permanent status after six months, when the CBA provided otherwise. We said:

> In order to prove their fraud and negligent misrepresentation claims, [plaintiffs] would be required to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts they believed they had made. Resolution of their state tort claims is therefore "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract."

Id. at 780 (quoting *Allis-Chalmers v. Lueck*, 471 U.S. 202, 220 (1985)). The same considerations compel preemption here, even more strongly. The entire "minor dispute" resolution system of the RLA was intended to provide prompt resolution, without resort to the courts, of disputes arising out of the employment relation. *Edelman*, 892 F.2d at 843, 45 U.S.C. § 151a. Melanson's claims are encompassed by that purpose.

CONCLUSION

The district court properly held that Melanson's state law claims are preempted by the RLA. We therefore affirm the judgment.

AFFIRMED.

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
WILLIAM J. DRITSAS
TYLER A. BROWN
One Post Street, Suite 2450
San Francisco, California 94104
(415) 397-2823

Attorneys for Defendant
UNITED AIR LINES, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NICHKOL MELANSON, Plaintiff, v. UNITED AIR LINES, INC. and DOES I to XX, inclusive, Defendants.	Case No. C 88 4551 CAL JUDGMENT BY THE COURT (Filed April 12, 1989)

This Court, having on March 24, 1989 granted Defendant United Air Lines, Inc.'s Motion for dismissal as to Plaintiff's Complaint and having ordered entry of judgment as requested in said motion.

IT IS ORDERED, ADJUDGED AND DECREED that this action be and hereby is dismissed with prejudice in its entirety and that judgment is hereby entered in favor of Defendant and against Plaintiff.

DATED: April 12, 1989

/s/ Charles A. Legge
The Honorable Charles A. Legge
Northern District Court Judge

ENTERED IN CIVIL
DOCKET 4/14, 1989

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
WILLIAM J. DRITSAS
TYLER A. BROWN
One Post Street, Suite 2450
San Francisco, California 94104
(415) 397-2823

Attorneys for Defendant
UNITED AIR LINES, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NICHKOL MELANSON, Plaintiff, v. UNITED AIR LINES, INC.; and DOES I to XX, inclusive, Defendants.	Case No. C 88 4551 CAL ORDER ON MOTION TO DISMISS (Filed April 12, 1989)

Having come on for hearing before this Court on March 24, 1989 at 9:30 a.m., or as soon thereafter as the matter was heard, and having considered the record in this matter, and the arguments and evidence presented by the parties to this action, by and through their attorneys of record, and having stated the reasons for the instant ruling in open Court,

IT IS HEREBY ORDERED that:

(1) Defendant's motion to dismiss be and hereby is GRANTED in its entirety.

(2) That this action be and hereby is dismissed with prejudice, and

(3) That judgment be entered in favor of Defendant and against Plaintiff.

DATED: April 12, 1989

/s/ Charles A. Legge
The Honorable Charles A. Legge
Northern District Court Judge

45 U.S.C. § 151. Definitions; short title

When used in this chapter and for the purposes of this chapter –

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to subtitle IV to Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any other receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or

defined by the provisions of this chapter or by the orders of the Commission.

The term "employees" shall not include, any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act."

---

45 U.S.C. § 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization: (3) to provide for the complete independence of carriers and of employees

in the matter of self-organization to carry out the purposes of this chapter: (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation of application of agreements covering rates of pay, rules, or working conditions.

---

45 U.S.C. § 155. Functions of Mediation Board

First, Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring

them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second, Interpretation of agreement.

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contract with Board; custody of records and documents

The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 157 of this title:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 157 of this title, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this chapter, shall be removed by such Board as provided by this chapter, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this chapter for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to

arbitrate under this chapter. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in

controversy to be submitted to it. No evidence other than that contained in the record file with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees have been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between

carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

---

45 U.S.C. § 181. Application of subchapter I to carriers by air

All of the provisions of subchapter I of this chapter, except section 153 of this title, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

---

45 U.S.C. § 182. Duties, penalties, benefits, and privileges of subchapter I applicable

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of

subchapter I of this chapter, except section 153 of this title, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

---

45 U.S.C. § 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on April 10, 1936, before the National Labor Relations Board shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by

system, group or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

---

45 U.S.C. § 185. National Air Transport Adjustment Board

When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or National Mediation Board is hereby empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organizations of their

employees, national in scope, as have been or may be recognized in accordance with the provisions of this chapter, to select and designate four representatives who shall constitute a board which shall be known as the "National Air Transport Adjustment Board." Two members of said National Air Transport Adjustment Board shall be selected by said carriers by air and two members by the said labor organizations of the employees, within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by section 153 of this title for the selection and designation of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceedings, in the manner prescribed in section 153 of this title. Vacancies in membership or office shall be filled, members shall be appointed in case of failure of the carriers or of labor organizations of the employees to select and designate representatives, members of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and awards made, stated, served, and enforced, and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 153 of this title. The powers and duties prescribed and established by the provisions of section 153 of this title with reference to the National Railroad Adjustment

Board and the several divisions thereof are conferred upon and shall be exercised and performed in like manner and to the same extent by the said National Air Transport Adjustment Board, not exceeding, however, the jurisdiction conferred upon said National Air Transport Adjustment Board by the provisions of this subchapter. From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board of adjustment established by any carrier or carriers by air and any class or classes of its or their employees is not satisfactory to either party thereto, the said party, upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board.

29 U.S.C. 185. Suits by and against labor organizations Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect

commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for

his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

California Civil Code section 1709,

> One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.

California Civil Code section 1710,

> A deceit, within the meaning of the last section, is either;
>
> 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.
>
> 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
>
> 4. A promise, made without any intention of performing it.

---

(2)

No. 91-178

In The

Supreme Court of the United States

October Term, 1991

NICHKOL MELANSON,

Petitioner,

vs.

UNITED AIR LINES, INC.,
An Illinois Corporation,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL D. ROBBINS
Trial Attorney
UNITED AIR LINES, INC.
1200 E. Algonquin Road
Elk Grove Township, IL
60007
(708) 952-5871

WILLIAM J. DRITSAS*
TYLER A. BROWN
SEYFARTH, SHAW,
FAIRWEATHER & GERALDSON
101 California Street,
Suite 2900
San Francisco, California
94111-5858
(415) 397-2823

Attorneys for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS RESTATED

1. Whether Petitioner's state tort claims for (1) negligent or intentional misrepresentation, (2) concealment and (3) promise without intent to perform, all of which relate to United Air Lines' work rules and working conditions and which would require this Court to refer to and interpret the terms of the collective bargaining agreement, are preempted by the Railway Labor Act.

2. Whether Petitioner may establish a separate employment contract which contradicts the terms negotiated by her exclusive bargaining representative.

STATEMENT REQUIRED BY RULE 29.1

Respondent United Air Lines, Inc. is wholly owned by UAL Corporation, a Delaware corporation. Respondent has no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

Page

QUESTIONS RESTATED i

STATEMENT REQUIRED BY RULE 29.1 ii

SUMMARY OF ARGUMENT 1

COUNTERSTATEMENT OF THE CASE 2

A. Statement Of Facts 2

B. Procedural History 4

ARGUMENT FOR DENIAL OF THE WRIT 6

A. The Supreme Court Holds That The Preemptive Scope Of The RLA Is Broader Than That Of § 301 7

1. RLA Preemption Is Broader Than § 301 Preemption Because The RLA Will Preempt Those Claims That Require Reference To The CBA, Not Merely Those Claims That Call For The CBA's Interpretation .. 11

2. The Ninth Circuit Properly Applied The RLA's Broad Preemptive Effect In The Instant Case 14

B. Petitioner's Argument That Her Claims Should Not Be Preempted Because She Is Asserting Statutory Rights Does Not Raise An Important Issue Of Law 16

C. Petitioner Cannot Construct Any Conflict In The Circuit Courts Of Appeal With Regard To RLA Preemption Of State Law Tort Claims .. 17

TABLE OF CONTENTS – Continued

Page

D. Petitioner Is Unable To Articulate Any Reason Why The Ninth Circuit Was Incorrect In Determining That Pre-Employment Representations Were Preempted By The RLA 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). 17

Andrews v. Louisville & N. R. Co., 406 U.S. 320 (1972) 9, 10, 12, 19

Atchison, Topeka and Santa Fe Ry. Co. v. Buell, 480 U.S. 557 (1987) 20

Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102 (2nd Cir. 1987) 10, 19

Beard v. Carrollton Railroad, 893 F.2d 117 (6th Cir. 1989) 10, 18, 21

Beers v. Southern Pac. Transp. Co., 703 F.2d 425 (9th Cir. 1983) 13

Bernhardt v. American Airlines, Inc., 511 F.2d 1219 (9th Cir. 1975) 13, 14

Boggs v. Consolidated Rail Corp., 112 L.R.R.M. (BNA) 2295 (D.C. Pa. 1982) 14

Brotherhood of Loc. Engineers v. Louisville & N. R. Company, 373 U.S. 33 (1963) 9

Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) 8

Carlson v. Southern Ry. Co., 494 F.Supp. 1104 (D.S.C. 1979) 13

Charles Dowd Box Company v. Courtney, 368 U.S. 502 (1962) 10

Choate v. Louisville & N. R.R., 715 F.2d 369 (7th Cir. 1983) 13

TABLE OF AUTHORITIES – Continued

Page

Coppinger v. Metro-North Commuter R.R., 861 F.2d 33 (2nd Cir. 1988) 20

De La Rosa Sanchez v. Eastern Airlines, Inc., 574 F.2d 29 (1st Cir. 1978) 13, 14

Edelman v. Western Airlines, Inc., 892 F.2d 839 (9th Cir. 1989) 5, 12, 17

Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945) ...11, 17

Essary v. Chicago & N.W. Transp. Co., 618 F.2d 13 (7th Cir. 1980) 12

Fraley v. Hayes, 112 L.R.R.M. (BNA) 2298 (S.D. Ill. 1982) 13

Gen. Com. of Adj., United Transp. Union v. CSX Railroad Co., 893 F.2d 584 (3rd Cir. 1990) 12, 17

Grote v. Trans World Airlines, Inc., 901 F.2d 1307 (9th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 386 (1990) 2, 7, 10, 15, 21

Hill v. Norfolk & W. Ry., 814 F.2d 1192 (7th Cir. 1987) 12, 13

International Association of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963) 8

J. I. Case Company v. NLRB, 321 U.S. 332 (1944) ...4, 22

Jackson v. Consolidated Rail Corp., 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) 21

Leu v. Norfolk & Western Ry. Co., 820 F.2d 825 (7th Cir. 1987) 12, 13, 14, 17

TABLE OF AUTHORITIES – Continued

Page

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) ..... *passim*

Louisville & N. R. v. Marshall, 586 S.W.2d 274 (Ky. Ct. App. 1979) 13

Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978) 5, 12, 13, 19

Majors v. U.S. Air, Inc., 525 F.Supp. 853 (D. Md. 1981) 13

McAlester v. United Airlines, Inc., 851 F.2d 1249 (10th Cir. 1988) 20

Merchant v. American S.S. Company, 860 F.2d 204 (6th Cir. 1988) 21

Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) 22

Pan American World Airways v. Puchert, 472 U.S. 1001 (1985) 19

Puchert v. Agsalud, 67 Haw. 25, 677 P.2d 449 (1984) 20

Railroad Labor Executives Ass'n v. Atchison, Topeka & Santa Fe Railway Co., 430 F.2d 994 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971) 11, 17

Salcedo v. Norfolk and Western Ry. Co., 572 F.Supp. 286 (E.D. Mich. 1982), *aff'd mem.*, 723 F.2d 911 (6th Cir. 1983) 13, 14

Schroeder v. Trans World Airlines, 702 F.2d 189 (9th Cir. 1983) 14

TABLE OF AUTHORITIES – Continued

Page

Schwadron v. Trans World Airlines, Inc., 585 F.Supp. 1371 (W.D. Pa. 1984) 14

Slocum v. Delaware, L. & W. R.R., 339 U.S. 239 (1950) 9

Spencer v. Missouri Pac. R. Co., 581 F.Supp. 1220 (E.D. Mo.), *aff'd*, 743 F.2d 627 (8th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) 12, 14

Stephens v. Norfolk & Western Ry., 792 F.2d 575 (6th Cir. 1986) 12

Trans World Airlines, Inc. v. Independent Fed. of Flight Attendants, 489 U.S. 426 (1989) 8

Union Pacific R. Company v. Sheehan, 439 U.S. 89 (1978) 5, 9

Woodrum v. Southern Ry. Co., 571 F.Supp. 352 (M.D. Ga. 1983), *aff'd* 750 F.2d 876 (11th Cir.) *cert. denied*, 474 U.S. 821 (1985) 13

Woolridge v. National Railroad Passenger Corp., 800 F.2d 647 (7th Cir. 1986) 12, 13, 14

STATUTES

California Civil Code, Sections 1709, 1710 16

Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 1

Labor Management Relations Act ("LMRA"), 29 U.S.C. § 173(d) 9

Labor Management Relations Act ("LMRA"), 61 Stat. 136, at § 101 8

TABLE OF AUTHORITIES – Continued

Page

Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) 1, 9

National Labor Relations Act of 1935 49 Stat. 449 8

Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* 1

Railway Labor Act ("RLA"), 45 U.S.C. § 151a 8

Railway Labor Act ("RLA"), 45 U.S.C. § 153 ..... 8, 9

Railway Labor Act ("RLA"), 45 U.S.C. § 184 ..... 8, 9

SUMMARY OF ARGUMENT

Contrary to Petitioner's claims, the petition for a writ of certiorari raises no important issues of law or conflict among the circuits. Instead, the case involves the routine application of well-settled preemption doctrine under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* Petitioner, unable to challenge the Ninth Circuit Court of Appeals' application of RLA authority, attempts to create an issue for certiorari by urging this Court (1) to consider whether RLA preemption should be patterned after the more restrictive preemptive effect of Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 and (2) to resolve a purported conflict between circuit court decisions applying § 301 in the context of this RLA preemption case. Neither claim withstands scrutiny nor merits granting the writ of certiorari.

Petitioner fails to acknowledge this Court's prior analysis of the broad preemptive scope of the RLA, as well as the distinct differences in policy and statutory language between the RLA and § 301. Further, there is no *RLA* case which conflicts with the underlying Ninth Circuit decision. Petitioner's attempt to create a conflict in the circuits by relying only on § 301 cases – thereby erroneously blurring fundamental differences between the RLA and § 301 – is analytically unsound and should be rejected.

Petitioner's arguments as to the merits of her claim also fail to raise any issue worthy of this Court's attention. As the Ninth Circuit properly recognized, Petitioner's state tort claims are preempted by the RLA because the dispute involves the applicability of United's

weight program, a condition of Petitioner's employment relationship. Because Petitioner's suit could not be resolved without an examination of her employment relationship and the collective bargaining agreement ("CBA"), it raises, under long-standing principles universally recognized by this Court and the lower courts, a "minor dispute" within the meaning of the RLA. Such disputes, consistent with the fundamental purpose of the RLA, are barred from litigation in the state courts and are subject to resolution exclusively through the RLA's mandatory administrative grievance procedures.

Indeed, this Court recently denied a petition for a writ of certiorari from a Ninth Circuit decision concerning the identical issues raised by the instant case. *See Grote v. Trans World Airlines, Inc.*, 901 F.2d 1307 (9th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 386 (1990). The same result is warranted here.

COUNTERSTATEMENT OF THE CASE

A. Statement Of Facts

Petitioner is a flight attendant, currently employed by Respondent United Air Lines, Inc. ("United" or "Respondent"), who transferred from Pan American Airlines ("Pan Am") after United purchased the Pacific Division of Pan Am in 1985. As part of that acquisition, United agreed to hire 1,202 of Pan Am's flight attendants to work the newly acquired routes. On August 6, 1985, the Association of Flight Attendants ("AFA" or "Union") opened negotiations with United over the employment conditions for the Pan Am flight attendants transferring

to United. (Clerk's Record, hereinafter "CR," at 25, Ex. A, ¶ 4). On September 11, 1985, in response to a request by the AFA for information on certain employee rights, the AFA was told that if an employee came to United with a weight problem, that employee would be handled in accordance with United's policy. (CR 25, Ex. A, ¶ 4). In the following months, prospective United flight attendants, then employed by Pan Am, were provided copies of United's work rules, including the United weight program. (CR 5, Ex. 3, § III A).

As a flight attendant, Petitioner is a member of the AFA and is covered by the collective bargaining agreement to which her Union and United agreed in the month prior to Petitioner's commencing employment at United. (CR 5, ¶ 2). That agreement expressly incorporates United's weight program, as well as establishes grievance procedures which are to take effect "in the event of any alleged action or inaction by a flight attendant." (CR 5, Ex. 1, p. 146). The agreement also provides that these grievance procedures may be utilized by:

> A group of flight attendants or a flight attendant who has a grievance concerning *any action of the Company which affects her/him*. . . . (CR 5, Ex. 1, § 26C) [emphasis added].

Finally, the agreement provides for a System Board of Adjustment which is the body empowered to arbitrate disputes:

> [B]etween any employee or the Union and Company and between the Company and the Union or any employee growing out of grievances or out of interpretation or application of any of the terms of this Agreement. (CR 5, Ex. 1, § 27D).

B. Procedural History

Petitioner originally filed this action in the Superior Court of the State of California, City and County of San Francisco. Respondent removed the case to the United States District Court for the Northern District of California on the grounds of federal question and diversity jurisdiction. (CR 1).

On or about November 18, 1988, United filed a motion to dismiss Petitioner's action on the ground that her claims were preempted by the RLA. (CR 6-7). In an order dated April 12, 1989, District Court Judge Charles A. Legge granted United's motion. (CR 27). Judgment was entered on United's behalf on the same date (CR 28) and Petitioner's notice of appeal to the United States Court of Appeal for the Ninth Circuit was filed on April 27, 1989. (CR 29). On April 24, 1991, the Ninth Circuit affirmed the District Court's dismissal. (Petitioner's Appendix, hereinafter "App.," at 1-12).

The Ninth Circuit held that Petitioner's dispute arose within the employment relationship and was therefore within the preemptive force of the RLA, even though Petitioner was not working at United at the time she alleges she was told she would not be subject to United's weight program. (App. 4-5). The Ninth Circuit relied on this Court's ruling in *J.I. Case Company v. NLRB*, 321 U.S. 332, 337-39 (1944) that collective bargaining agreements ("CBA") supersede inconsistent individual employment contracts of the type that Petitioner believed to have existed. The harmful effect on the federal labor scheme of allowing such individual agreements to conflict with a CBA, the Ninth Circuit held, would be the same whether

the agreement was reached prior to or during a formal employment relationship. It is the relationship of the claim to the CBA, not the Plaintiff's employment status, that determines whether a claim will be preempted. (App. 4-5).

The Ninth Circuit then set forth the long-standing statutory framework enacted by Congress for resolving labor disputes in the railroad and airlines industries. (App. 6-7). Under that framework, "minor disputes" are relegated to exclusive and mandatory administrative grievance procedures. "Minor disputes" are defined as the "grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions." (App. 6, citing *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 94 (1978)). The Ninth Circuit has also defined minor disputes as those which are "arguably" governed by a CBA, have a "not obviously insubstantial" relationship to the labor contract or "are 'inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the RLA.' " (App. 6-7, citing *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 843 (9th Cir. 1989) (quoting *Magnuson*, 576 F.2d at 1369)).

The Ninth Circuit found that all three of Petitioner's fraud theories were preempted because each required reference to and interpretation of the CBA. The Ninth Circuit held that to demonstrate the falsity of United's alleged representations regarding its weight program, Petitioner would have to show that the relevant provisions of the CBA differed significantly from United's

representations. This showing necessarily required reference to and interpretation of the terms of the CBA. As the Ninth Circuit stated:

> If the CBA in fact guaranteed Melanson an exemption from the weight requirements, her claim would clearly be affected, if not defeated. Her claim can scarcely be litigated without reference to the CBA. (App. 11).

Finally, the Ninth Circuit rejected Petitioner's argument that the preemption issue should be analyzed in light of this Court's decision in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). The Ninth Circuit held that the narrower test for § 301 preemption under *Lingle* is not necessarily determinative of preemption under the RLA because preemption under the RLA is broader than under § 301. (App. 7, citing *Grote*, 905 F.2d at 1310).

ARGUMENT FOR DENIAL OF THE WRIT

The petition is not worthy of this Court's attention. The essence of Petitioner's argument is that this Court should strike down long-standing authority establishing the differences between preemption analysis under § 301 and the RLA. Yet, Petitioner is completely unable to set forth any persuasive reason why, despite the basic differences between those statutes, the Court should constrict the RLA preemptive scope to mirror § 301 preemption. Moreover, Petitioner is unable to cite a single conflict among the circuit courts on this issue. Because this case

involves, at best, a routine application of RLA preemption of state law torts, an issue which this Court has recently elected not to review, *see Grote, supra*,[1] the petition should be denied.

A. The Supreme Court Holds That The Preemptive Scope Of The RLA Is Broader Than That Of § 301

Petitioner argues that because § 301 and RLA have some similarities, and because some circuit courts have held that *§ 301* does not preempt state tort claims similar to those presented here, this Court should hold that *neither* statute preempts such state tort causes of action. Furthermore, Petitioner argues that this Court's decision in *Lingle* should govern the RLA preemption analysis of her tort causes of action.

This tortured logic, however, overlooks the fundamental difference between the preemptive effect of the RLA and that of § 301. As this Court recently reiterated:

---

[1] In *Grote*, plaintiff claimed that after he suffered chest pains, TWA requested that he perjure himself to the Federal Air Surgeon in order to get recertified to resume his flight duties. Because the CBA dealt with the company's ability to require such certificates, plaintiff's claims were at least "arguably governed" by that contractual language. *Grote*, 905 F.2d at 1309. Therefore, the Ninth Circuit held that plaintiff's claims for both tort and contractual causes of action were preempted by the RLA. The court rejected plaintiff's argument that the case should be analyzed in accordance with this Court's analysis of § 301 under *Lingle*, holding the RLA's preemptive effect was much broader than that of § 301.

"[T]he NLRA[2] 'cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes.' " *Trans World Airlines, Inc. v. Independent Fed. of Flight Attendants*, 489 U.S. 426, 432 (1989) (quoting *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969)).

Perhaps the most pronounced difference between the two statutes is the manner in which Congress provided for dispute resolution. To promote the fundamental RLA purposes of "avoid[ing] any interruption to commerce" and "provid[ing] for the prompt and orderly settlement of all disputes growing out of . . . the interpretation or application of agreements," *see* 45 U.S.C. § 151a, the RLA requires the parties' collective bargaining agreements in the airline industry to establish adjustment boards[3] and to submit to those boards all so-called "minor disputes" that are not resolved through the statutorily required

---

[2] The National Labor Relations Act of 1935, 49 Stat. 449, was amended and restated as part of the Labor Management Relations Act of 1947 ("LMRA"), 61 Stat. 136, at § 101 (1947). Section 301 of the LMRA was enacted at that same time.

[3] Section 3 of the RLA, 45 U.S.C. § 153, establishes the National Railroad Adjustment Board ("NRAB") for the determination of minor disputes in the railroad industry. Section 204, 45 U.S.C. § 184, makes Section 3 applicable to air carriers and their employees and requires the establishment of private system boards of adjustment, analogous to the NRAB, for resolution of minor disputes in the airline industry. *See, International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963).

contractual grievance procedure. *See* 45 U.S.C. §§ 153, 184. This Court has often emphasized the importance of relegating minor disputes to the exclusive jurisdiction of the various adjustment boards. *See, e.g., Union Pacific R. Company v. Sheehan*, 439 U.S. 89, 94 (1978) (per curiam) ("Congress considered it essential to keep the so-called 'minor' disputes within the Adjustment Board and out of the courts."); *Brotherhood of Loc. Engineers v. Louisville & N. R. Company*, 373 U.S. 33, 38 (1963) ("statutory grievance procedure is a mandatory, exclusive, and comprehensive system" which cannot be circumvented "by resorting to some other forum"); *Slocum v. Delaware, L. & W.R.R.*, 339 U.S. 239, 243 (1950). Thus:

> [T]he notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law.

Andrews v. Louisville & Nashville R. Co., 406 U.S. 320, 322 (1972).

The mandatory and exclusive jurisdiction granted to adjustment boards under the RLA stands in sharp contrast to the legislative scheme under the LMRA, of which § 301 is a part. Thus, in LMRA Section 203, Congress consciously rejected compulsory arbitration and instead established a policy that merely favors resort to administrative remedies. *See* 29 U.S.C. § 173(d). Indeed, § 301 itself expressly states that "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States" (29 U.S.C. § 185(a) (1982)). Section 301 thereby creates concurrent state and federal jurisdiction over specified labor

disputes. *Charles Dowd Box Company v. Courtney*, 368 U.S. 502, 506 (1962).

It is this difference in the preemptive scope of the two statutes which has led this Court, as well as *inter alia* the Second, Sixth and Ninth Circuits, to conclude that the RLA's preemptive force is broader than that of § 301. In *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 323 (1972), this Court held:

> [S]ince the compulsory character of the administrative remedy provided by the [RLA] for disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the LMRA.

Andrews, 406 U.S. at 323; *see also Grote*, 905 F.2d at 1309-10 ("[B]ecause the RLA's preemptive force appears on the face of the statute and § 301 preemption is judicially imposed, we conclude that preemption under the RLA is broader than under § 301."); *Beard v. Carrollton Railroad*, 893 F.2d 117, 122 (6th Cir. 1989); *Baldracchi v. Pratt & Whitney Aircraft Div.*, 814 F.2d 102, 106 (2nd Cir. 1987).

Petitioner all but ignores this substantial body of case authority in the vain hope of steering this Court away from the broad preemptive effect of the RLA. Instead, Petitioner would substitute the narrower interpretation of § 301 preemption set forth by this Court in *Lingle*. Taking into account the statutory mandate of the RLA and the policy of ensuring the continued uninterrupted operation of the railroads and airlines, however, no basis or reason

exists for melding the preemption analysis of the two statutes.

1. RLA Preemption Is Broader Than § 301 Preemption Because The RLA Will Preempt Those Claims That Require Reference To The CBA, Not Merely Those Claims That Call For The CBA's Interpretation

An examination of how each statute addresses preemption readily demonstrates how the courts have maintained each statute's separate identity. Preemption analysis under § 301, as most recently defined by this Court in *Lingle*, focuses on the contractual language of the CBA. Thus, as the *Lingle* Court stated:

> An application of state law is preempted by Section 301 of the [LMRA] only if such application requires *the interpretation* of a [CBA].

Lingle, 108 S.Ct. at 1885. (Emphasis added.)

Courts analyzing preemption under the RLA, on the other hand, have consistently described the RLA's mandatory preemptive scope in much broader terms:

> *The [exclusive] jurisdiction of the adjustment board is not limited to disputes arising from provisions specifically included in a [CBA].* If the claim is founded upon *some incident of the employment relationship, or an asserted one,* the board may determine the meaning and effect of the provisions of the [CBA] with reference either to an included or to an omitted case.

Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723 (1945); *Railroad Labor Executives Ass'n v. Atchison, Topeka & Santa*

Fe Railway Co., 430 F.2d 994, 997 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); *Gen. Com. of Adj., United Transp. Union v. CSX Railroad Co.*, 893 F.2d 584, 592 (3rd Cir. 1990) ("either express or implied contractual terms, as interpreted through established past practice, will serve to classify a dispute as minor"); *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 845 (9th Cir. 1989) (plaintiff cannot avoid preemption by omitting any reference to the CBA in complaint); *Leu v. Norfolk & Western Ry. Co.*, 820 F.2d 825, 829 (7th Cir. 1987) (if the alleged responsibility of the carrier arises from a "course and practice" of the carrier rather than from a provision of a CBA, the question of whether that responsibility exists at all requires an interpretation of the CBA).

Thus, the decision below is in complete harmony with the holdings of this Court and those of other federal courts, which have universally recognized that "[employees] cannot escape the exclusive governance of the RLA by articulating their claim in terms of a state tort action." *Leu*, 820 F.2d at 830; *see also, Stephens v. Norfolk & Western Ry.*, 792 F.2d 575, 580-81 (6th Cir. 1986). The courts have, therefore, repeatedly and consistently held (as did the Ninth Circuit in the instant case) that they lack subject matter jurisdiction over such claims regardless of whether such claims are phrased as wrongful termination,[4] "harass[ment]" or "outrageous

---

[4] *See, e.g., Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 323-24 (1972); *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192 (7th Cir. 1987); *Woolridge v. National Railroad Passenger Corp.*, 800 F.2d 647, 649 (7th Cir. 1986); *Essary v. Chicago & N.W. Transp. Co.*, 618 F.2d 13, 17 (7th Cir. 1980); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *Spencer v. Missouri Pac. R. Co.* 581 F.Supp. 1220, 1221 (E.D. Mo.), *aff'd*, 743 F.2d 627 (8th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).

conduct,"[5] wrongful or malicious withholding of benefits,[6] infliction of "severe anguish" or "mental suffering,"[7] "fabricating documents concerning [the employee's] case,"[8] "constitutional" violations,[9] defamation,[10] false imprisonment,[11] fraud,[12] interference

---

[5] *See, e.g., Beers v. Southern Pac. Transp. Co.*, 703 F.2d 425, 427, 429 (9th Cir. 1983).

[6] *See, e.g., De La Rosa Sanchez v. Eastern Airlines, Inc.*, 574 F.2d 29, 32 (1st Cir. 1978).

[7] *See, e.g., Beers*, 703 F.2d at 429; *Choate v. Louisville & N. R.R.*, 715 F.2d 369, 371 (7th Cir. 1983); *Magnuson*, 576 F.2d at 1369; *Salcedo v. Norfolk and Western Ry. Co.*, 572 F.Supp. 286, 288 (E.D. Mich. 1982), *aff'd mem.*, 723 F.2d 911 (6th Cir. 1983).

[8] *See, e.g., Hill v. Norfolk & W. Ry.*, 814 F.2d 1192 (7th Cir. 1987); *Woolridge v. National Railroad Passenger Corp.*, 800 F.2d 647, 648-49; *Magnuson*, 576 F.2d at 1369-70.

[9] *See, e.g., Woodrum v. Southern Ry. Co.*, 571 F.Supp. 352, 359 (M.D. Ga. 1983), *aff'd* 750 F.2d 876 (11th Cir.) *cert. denied*, 474 U.S. 821 (1985); *Bernhardt v. American Airlines, Inc.*, 511 F.2d 1219 (9th Cir. 1975) (per curiam).

[10] *See, e.g., Majors v. U.S. Air, Inc.*, 525 F.Supp. 853 (D. Md. 1981); *Carlson v. Southern Ry. Co.*, 494 F.Supp. 1104 (D.S.C. 1979); *Fraley v. Hayes*, 112 L.R.R.M. (BNA) 2298 (S.D. Ill. 1982); *Louisville & N. R v. Marshall*, 586 S.W.2d 274 (Ky. Ct. App. 1979).

[11] *See, Majors v. U.S. Air, Inc.*, 525 F.Supp. 853 (D. Md. 1981).

[12] *See, e.g., Leu v. Norfolk & Western Ry. Co.*, 820 F.2d 825 (7th Cir. 1987); *Woodrum v. Southern Ry. Co.*, 571 F.Supp. 352 (M.D. Ga. 1983); *aff'd*, 750 F.2d 876 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985).

with contractual relations,[13] negligent misrepresentation,[14] unlawful business practices,[15] "deliberate breach of an obligation designed to cause damage to another,"[16] conspiracy,[17] wrongful refusal to recall from furlough,[18] conversion,[19] or breach of the implied covenant of good faith and fair dealing.[20]

2. The Ninth Circuit Properly Applied The RLA's Broad Preemptive Effect In The Instant Case

Given the broad standard for determining the scope of RLA preemption set forth by this Court and the circuit courts, it is clear that the Ninth Circuit properly applied that standard in the instant case. The Ninth Circuit found that to prevail on her misrepresentation theories,

---

[13] *See, Salcedo v. Norfolk & Western Ry.*, 572 F.Supp. 286 (E.D. Mich. 1982), *aff'd mem.*, 723 F.2d 911 (6th Cir. 1983).

[14] *See, Schwadron v. Trans World Airlines, Inc.*, 585 F.Supp. 1371 (W.D. Pa. 1984).

[15] *See, Schroeder v. Trans World Airlines*, 702 F.2d 189 (9th Cir. 1983).

[16] *See, De La Rosa Sanchez v. Eastern Airlines, Inc.*, 574 F.2d 29 (1st Cir. 1978).

[17] *See, e.g., Bernhardt v. American Airlines, Inc.*, 511 F.2d 1219 (9th Cir. 1975); *Spencer v. Missouri Pac. R. Co.*, 581 F.Supp. 1220 (E.D. Mo.) *aff'd*, 743 F.2d 627 (8th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).

[18] *See, Boggs v. Consolidated Rail Corp.*, 112 L.R.R.M. (BNA) 2295 (D.C. Pa. 1982).

[19] *See, Leu v. Norfolk & W. Ry.*, 820 F.Supp. 825 (7th Cir. 1987).

[20] *See, Woolridge v. National Railroad Passenger Corp.*, 800 F.2d 647 (7th Cir. 1986).

Petitioner would have to show that United made a false representation of material fact regarding its weight program, which showing in turn would require that the relevant provisions of the CBA differ significantly from those representations. Petitioner's claims, therefore, necessarily require reference to and interpretation of the terms of the collective bargaining agreement; only by examining the provisions of the weight program could the trier of fact determine if the alleged misrepresentations were, in fact, false.

Petitioner's only rejoinder is to fall back on her question-begging *ipse dixit* that the stricter standards of § 301 preemption should govern and that, under *Lingle*, her claims do not require "interpretation" of the CBA.[21] As this case concerns the broader RLA preemptive force,

---

[21] Petitioner's claim also suffers from an overly restrictive definition of the term "interpretation." Again mistakenly relying on *Lingle*, Petitioner asks this Court to adopt a definition of "interpretation" that is tantamount to requiring an analysis or study of contractual terms to ascertain their meaning or effect. This is too strict a definition because it does not take into account the broader RLA preemption that merely asks whether a claim requires reference to the CBA. For example, in *Grote*, the plaintiff claimed that the airline required him to perjure himself to the Federal Air Surgeon in order to obtain medical certification. A paragraph of the CBA dealt with the airline's ability to require any of its pilots to obtain a current medical certificate. Thus, the court held that the subject of Grote's claim was arguably governed by that paragraph of the agreement and found that the claim was preempted by the RLA. *Grote*, 905 F.2d at 1309. Similarly, here, the provisions of the weight program arguably govern Petitioner's claims and inescapably lead to preemption.

Petitioner's arguments are without merit and do not warrant review by this Court.[22]

B. Petitioner's Argument That Her Claims Should Not Be Preempted Because She Is Asserting Statutory Rights Does Not Raise An Important Issue Of Law

Petitioner relies on *Lingle* for the proposition that employees' claims based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers are not preempted by § 301. *Lingle*, 486 U.S. at 406. Petitioner asserts that her claims arise out of statutes designed to provide minimum substantive guarantees to all citizens (Cal. Civ. Code §§ 1709, 1710) and therefore should not be preempted by the RLA.

Aside from the fact that this case concerns the RLA and not § 301, Petitioner's argument again misperceives the focus of RLA preemption analysis. This Court and all circuit courts applying the RLA unanimously hold that a court faced with a preemption issue must examine the extent to which a cause of action is founded on the employment relationship or requires reference to the CBA, not whether that cause of action is based on a

---

[22] Implicit in Petitioner's argument is the assumption that the Ninth Circuit's decision in this case would have been different if the court had analyzed the issues under *Lingle*. As the Ninth Circuit properly held, however, Petitioner's claims would not only require reference to the CBA, but would actually require its interpretation. (App. 9-11). Moreover, the Court stated that its analysis would not change if the more restrictive § 301 standard was applied. (App. 7-8 at fn. 3.) Thus, Petitioner's claims are preempted regardless of the statute under which they are analyzed.

statute. *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945); *Railroad Labor Executives Ass'n v. Atchison, Topeka & Santa Fe Railway Co.*, 430 F.2d 994, 997 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); *Gen. Com. of Adj., United Transp. Union v. CSX Railroad Co.*, 893 F.2d 584 (3rd Cir. 1990); *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 843 (9th Cir. 1989); *Leu v. Norfolk & Western Ry. Co.*, 820 F.2d 825, 828, fn. 7 (7th Cir. 1987). Thus, Petitioner's "statutory" argument merely rehashes her argument that the RLA and § 301 should be analyzed similarly. Neither argument is worthy of this Court's review.[23]

C. Petitioner Cannot Construct Any Conflict In The Circuit Courts Of Appeal With Regard To RLA Preemption Of State Law Tort Claims

In arguing that a conflict exists among the circuit courts of appeal, Petitioner repeats her earlier mistake by claiming that the Ninth Circuit's RLA preemption analysis conflicts with those courts that, she believes, analyze

---

[23] Moreover, on a common sense level, virtually every statute or local ordinance is designed to provide some "minimum substantive guarantees to citizens." Further, most disputes can be recharacterized as involving some state statutory claim, even though the crux of the conduct involves the working conditions governed by federal law. Permitting employees to circumvent the preemptive force of the RLA any time a state statutory right existed would make a mockery of the RLA's regulatory scheme. The logical conclusion of Petitioner's argument would result in the destruction of the exclusive alternative dispute resolution procedures required by the RLA and cause the loss of the stability that the RLA was enacted to provide. *Cf., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

the RLA and § 301 interchangeably. While there are certainly cases in which courts have analogized between the two statutes, Petitioner's argument fails because, as set forth above, the RLA is not interchangeable with § 301, but rather is far broader in preemptive effect. In fact, the manner in which the circuit courts of appeal have handled preemption of state tort claims under the RLA is perfectly consistent and requires no clarification by this Court.

For example, *Beard v. Carrollton Railroad*, 893 F.2d 117 (6th Cir. 1989), held that a state law tort claim was preempted by the RLA because state law made breach of contract an essential element of the tort and, therefore, required interpretation of the CBA. *Beard*, 893 F.2d at 122. In so holding, the court recognized that the *Lingle* approach was instructive and consistent with preemption analysis under the RLA. The court, however, also recognized that the RLA was broader and that "it is probably more likely that a state law claim will interfere with federal interests in the context of [the RLA]." *Beard*, 893 F.2d at 122. Thus, rather than supporting Petitioner's assertion that § 301 and the RLA are interchangeable, *Beard* makes it clear that there are significant differences between the two statutes.

Likewise, the Ninth Circuit's holding in the instant case is perfectly consistent with *Beard*. In both cases, the courts properly held that the inquiry should focus on whether the asserted causes of action require the court to refer to the CBA. As both the *Beard* causes of action and

Melanson's fraud claims required reference to the CBA, preemption was appropriate.[24]

Petitioner cites *Baldracchi v. Pratt & Whitney Aircraft Division*, 814 F.2d 102 (2nd Cir. 1987), a case analyzing preemption under § 301, apparently because that decision relies in part on this Court's ruling in *Pan American World Airways v. Puchert*, 472 U.S. 1001 (1985). In *Puchert*, this Court dismissed the appeal from the Hawaiian Supreme Court, without discussion, for want of a federal question. The Hawaiian Supreme Court had held that the RLA did not preempt a state cause of action for discharge in retaliation for filing a workers' compensation claim. The *Baldracchi* court reasoned that if the broader preemption scheme of the RLA did not cover that claim, that a similar claim would therefore not be preempted by § 301.

Baldracchi is in complete accord with the Ninth Circuit's decision in this case. In *Baldracchi*, the Connecticut statute stated that a charge thereunder was not to be decided by reference to a labor contract. Accordingly,

---

[24] Petitioner also mistakenly relies on the absence of a decision by this Court expressly holding a state tort (as opposed to contract) claim preempted by the RLA. Petition ("Pet.") at 9-10. *See, Andrews*, 406 U.S. at 324 ("wrongful discharge" claim preempted). Petitioner also asserts that there is a difference in how courts analyze preemption of tort and contract clauses of action. Pet. 10. Petitioner is again incorrect. The issue is not tort versus contract, but rather whether the cause of action requires reference to the CBA and the employment relationship. *Magnuson*, 576 F.2d at 1369.

unlike the instant case, there was no need to refer to or interpret the contract.[25]

Finally, Petitioner misplaces reliance on two cases which hold that the RLA does not preempt federal statutory causes of action where the claims have legally independent origins, separate and apart from the CBA. In both *Coppinger v. Metro-North Commuter R.R.*, 861 F.2d 33, 36 (2nd Cir. 1988) and *McAlester v. United Airlines, Inc.*, 851 F.2d 1249, 1252-1255 (10th Cir. 1988), independent *federal* statutory schemes for redressing constitutional wrongs to aggrieved individuals were at stake; nothing in either statutory plan suggested that a prior determination in an arbitration proceeding prevented a plaintiff from bringing suit in federal court or divested that court of jurisdiction. *Coppinger*, 861 F.2d at 37; *McAlester*, 851 F.2d at 1255-56. Most important, however, in neither case was the court required to refer to the language of the CBA in resolving the issue. *Coppinger*, 861 F.2d at 36; *McAlester*, 851 F.2d at 1253. Accordingly, there is no inconsistency between these two opinions and the Ninth Circuit's decision in the instant case. On the contrary, *Coppinger* and *McAlester* merely follow this Court's holding in *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987),

---

[25] Nor does the *Puchert* decision conflict with traditional RLA preemption analysis. The Hawaiian Supreme Court held that the resolution of the dispute in question did not hinge on the application or interpretation of the CBA, but rather was solely dependent on the statutory language. *Puchert v. Agsalud*, 67 Haw. 25, 30, 677 P.2d 449, 454 (1984). Other cases holding that state law claims were preempted by the RLA were deemed distinguishable by the Hawaiian Supreme Court on the grounds that the claims in those cases were identical to the contractual claims provided for in the CBA. *Id.*

that Congress has the power to limit the ambit of its own laws. *See also Grote*, 905 F.2d at 1310.[26]

The cases cited by Petitioner do not establish the existence of a conflict among the circuit courts as to the analysis of RLA preemption of state law tort claims. As there is no conflict, the instant petition should be denied.

---

[26] Petitioner also relies on *Merchant v. American S.S. Company*, 860 F.2d 204 (6th Cir. 1988), a § 301 case, as an example of the Sixth Circuit's criticism of RLA preemption of state law claims under *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). As *Merchant* is a case decided under § 301, and as its comments regarding the RLA are merely dicta, *Merchant* does not even begin to suggest a conflict in the way in which circuit courts interpret the RLA after *Lingle*. If such a conflict existed, the Ninth Circuit's decision in *Grote, supra*, would have provided an opportunity for this Court to review that conflict. Just as this Court elected not to accept certiorari on *Grote*, so too should it deny Petitioner's request here.

Moreover, *Merchant* is hardly persuasive authority given the fact that the Honorable David A. Nelson, Circuit Judge and author of that opinion, also wrote the majority opinion in *Beard, supra*, a Sixth Circuit case decided a year after *Merchant*. In *Beard*, Judge Nelson expressly relied on *Jackson* in determining that state law tort claims required interpretation of the CBA and were, therefore, preempted by the RLA. *Beard*, 893 F.2d at 122.

D. Petitioner Is Unable To Articulate Any Reason Why The Ninth Circuit Was Incorrect In Determining That Pre-Employment Representations Were Preempted By The RLA

Petitioner argues that the Ninth Circuit was incorrect in determining that the timing of the alleged misrepresentations was not fatal to RLA preemption. The Ninth Circuit relied on this Court's rulings in *J. I. Case Company v. NLRB*, 321 U.S. 332, 337-39 (1944) and *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346-47 (1944) to find that the collective bargaining agreement supersedes inconsistent individual employment contracts. According to the Ninth Circuit:

> The effect on the federal labor scheme of allowing individual agreements that conflict with the CBA would be the same whether the agreement is reached prior to or during a formal employment relationship. The timing of the agreement or alleged tortious act, then, is not necessarily determinative. *It is the relationship of the claim to the CBA, regardless of the plaintiff's employment status, that guides the preemption analysis.*

App. 4-5. (Emphasis added.)

Petitioner's only response to this forceful argument is that she is not attempting to enforce a separate agreement. Nevertheless, Petitioner cannot deny that if United indeed made misrepresentations, those misrepresentations would form the terms of a separate agreement different from those of the collective bargaining agreement. Under these circumstances, the threat to the federal labor scheme is clear and cannot be permitted, regardless of Petitioner's employment status at the time of the alleged

misrepresentations. As the claim relates to the CBA, Petitioner's employment status is wholly irrelevant.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL D. ROBBINS
Trial Attorney
UNITED AIR LINES, INC.
1200 E. Algonquin Road
Elk Grove Township, IL
60007
(708) 952-5871

WILLIAM J. DRITSAS*
TYLER A. BROWN
SEYFARTH, SHAW,
FAIRWEATHER & GERALDSON
101 California Street,
Suite 2900
San Francisco, California
94111-5858
(415) 397-2823

Attorneys for Respondent United Air Lines, Inc.

August 22, 1991

*Counsel of Record

No. 91-178

In The

Supreme Court of the United States

October Term, 1991

NICHKOL MELANSON,

Petitioner,

vs.

UNITED AIRLINES, INC.,
An Illinois Corporation,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

EDITH J. BENAY
Counsel of Record for Petitioner
345 Franklin Street
San Francisco, California 94102
Telephone: (415) 241-7286

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. SUMMARY OF ARGUMENT 1

II. RESPONDENT'S STATEMENT OF FACTS 2

III. REASONS FOR GRANTING THE WRIT 3

A. RESPONDENT ACKNOWLEDGES THAT THE RLA DOES NOT PREEMPT STATE TORT CLAIMS STEMMING FROM A STATE STATUTE RATHER THAN FROM THE CBA 3

1. THE NINTH CIRCUIT HAS ALSO HELD THAT THE RLA DOES NOT PREEMPT STATE CLAIMS STEMMING FROM A STATUTE RATHER THAN FROM THE CBA 5

2. THE SUPREME COURT SHOULD CLARIFY THE USE OF THE TERM "INTERPRETATION" AS USED IN THE RLA AND AS USED IN THE LMRA 6

B. IT IS UNITED'S CONDUCT WHICH THREATENS THE FEDERAL LABOR LAW SCHEME, NOT PETITIONER'S CLAIM FOR DAMAGES 7

C. RESPONDENT'S ARGUMENT AGAINST CERTIORARI IS BASED ON MISCHARACTERIZATION OF PETITIONER'S CLAIMS ... 9

1. THIS CASE CANNOT BE COMPARED TO *GROTE V. TRANS WORLD AIRLINES, INC.* 9

IV. CONCLUSION 10

TABLE OF AUTHORITIES

Page

Federal Cases

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 105 S.Ct. 1904 (1985) 10

Anderson v. Ford Motor Co., 803 F.2d 953, *cert. denied*, 481 U.S. 1049 (107 S.Ct. 3242) 7

Andrews v. Louisville & Louisville R. Co., 406 U.S. 320 (92 S.Ct.1562) 4, 10

Berda v. CBS Inc., 881 F.2d 20, *cert. denied*, U.S. (110, S.Ct.879) 6

Grote v. Trans World Airlines, Inc., 901 F.2d 1307, *cert. denied*, ___ U.S. ___, (111 S.Ct. 386) 2, 9

Wells v. General Motors Corp., 881 F.2d 166, *cert. denied*, ___ U.S. ___, (110 S.Ct. 199) 7

State Cases

Foley v. Interactive Data Corp., 47 C3d 654, 254 CR 211 (1988) 10

Polich v. Burlington Northern, Inc.; Burlington Northern Railroad Company, 91 C.D.O.S. 6816 (9th Cir. 1991) 5

Puchert v. Agsalud, 67 Haw. 25 (677 P.2d 449) *cert. denied, Pan American World Airways v. Puchert*, 472 U.S. 1001 (105 S.Ct. 1693) 1, 3, 6

State Statutes

Cal. Civ. Code Section 1709 6

Cal. Civ. Code Section 1710 6

Mont. Code Ann. 69-14-1002 5

I.

SUMMARY OF ARGUMENT

Respondent United Airlines, Inc. (United) in its opposing brief in No. 91-178, actually confirms the need to grant certiorari in this case by raising arguments which highlight the current inconsistencies and confusion in the policy of Railway Labor Act (RLA) preemption of state tort claims.

Respondent acknowledges that the Hawaiian Supreme Court's decision in *Puchert v. Agsalud*, 67 Haw. 25, 677 P.2d 449 (1984), *cert. denied, Pan American World Airways v. Puchert*, 472 U.S. 1001, 105 S.Ct. 1693 (1985) (App. 1) is in accord with "traditional RLA preemption analysis" (p.20, ftnt.25.) In that case the court held that a claim was not preempted by the RLA when "the source of the right" on which it was based was statutory, and when the claim was not identical to any claim that could have been made under the collective bargaining agreement (CBA). *Id.* (App. 7, 10.)

At the same time, however, Respondent argues that the RLA preempts any state claim which merely "refers" to terms contained in the CBA, contending that the word "interpretation" is defined very differently under the RLA than it is under the Labor Management Relations Act (LMRA). (p.15, ftnt.21.)

Another reason for granting certiorari, which United highlights in its opposing brief, is the threat to the federal labor scheme from the creation and enforcement of "separate contracts." (p.22.) Respondent argues that petitioner threatens the federal labor scheme by seeking damages for what amounts to a "separate agreement."

Respondent admits that United's representations[1] would constitute an agreement "separate" from the CBA. However, Respondent fails to acknowledge that it is not Petitioner's claim for damages which threatens the federal labor scheme. It is United's own conduct in initially offering, entering into and enforcing this separate agreement which constitutes the threat.

Finally, throughout its Brief in Opposition, Respondent supports its position by mischaracterizing Petitioner's claims, as in its contention that *Grote v. Trans World Airlines, Inc.*, 901 F.2d 1307 (9th Cir.), *cert. denied*, ___ U.S. ___, (111 S.Ct. 386) (1990), a wrongful termination action based squarely on the CBA, raises issues "identical" to those raised in this case. (pgs. 2, 6-7, 15.)

II.

RESPONDENT'S STATEMENT OF FACTS

The Statement of Facts in Respondent's Counterstatement of the case actually confirms Petitioner's allegations.

Respondent does not dispute Petitioner's allegations of misrepresentations regarding "waiver" of the weight program or the availability of medical exceptions. Nor does Respondent dispute that United communicated directly with the Pan American Airlines (Pan AM) flight attendants during the recruitment process, with none of the unions participating in that process. However, Respondent does state that as early as September, 1985,

---

[1] Respondent's Counter Statement of the Case does not dispute Petitioner's allegations.

when United and the Association of Flight Attendants (AFA) first began negotiating over working conditions for Pan Am transferees (p.2), United told AFA that Pan Am transferees would be subject to the weight program. (p.3).

Respondent does not state that the terms of the agreement reached with AFA was communicated to the transferees. However, Respondent does state that agreement was not reached until "in the month prior to Petitioner's commencing employment at United" (p.3). Thus, not only was Petitioner not an employee at the time the misrepresentations were made, but the CBA which purportedly preempts her fraud claims did not even exist at that point.

III.

REASONS FOR GRANTING THE WRIT

A. RESPONDENT ACKNOWLEDGES THAT THE RLA DOES NOT PREEMPT STATE TORT CLAIMS STEMMING FROM A STATE STATUTE RATHER THAN FROM THE CBA

Respondent admits that the decision of the Hawaiian Supreme Court in *Puchert v. Agsalud*, 67 Haw. 25, 677 P.2d 449 (1984), *cert. denied, Pan American World Airways v. Puchert*, 472 U.S. 1001, 105 S.Ct. 1693 (1985) (App. 1) is in accord with traditional RLA preemption analysis.

However, contrary to Respondent's interpretation of *Puchert*, the decision does not say that the state claim avoids preemption because the dispute in question is "solely dependent on the statutory language." (p.20,

ftnt.25.) Rather than base its holding on such narrow grounds, the Hawaiian Supreme Court concluded that " . . . the *source of the right* on which Puchert based his complaint is state statute, not the collective bargaining agreement." (Emphasis added.) (App. 10) The court also concluded that the statute itself is not preempted by the RLA because the state has a substantial interest and because the regulation did not interfere with the scheme and purpose of the RLA. (App. 10.)

Citing decisions under both the RLA and the LMRA the Hawaiian Supreme Court noted that courts are not denied jurisdiction over statutory claims " . . . merely because a collective bargaining agreement exists which provides for grievance and arbitration procedures." *Id.* (App. 7.)

The court distinguished cases which have found preemption, on the grounds that the claims in those cases were identical to contractual claims under the CBA. *Id.* (App. 7.) That is also the distinguishing feature of the cases cited by Respondents, including *Andrews v. Louisville & Louisville R. Co.*, 406 U.S. 320, 92 S.Ct. 1562 (1972). Respondent refers to *Andrews*, a wrongful termination case, as a decision by this Court which expressly holds a state tort claim preempted by the RLA. (p.19, ftnt.24.) Technically, Respondent is correct, but the Court's reason for preempting the wrongful termination claim was that the CBA was the exclusive source of Petitioner's right not to be terminated, making it essentially a dispute over contract interpretation. *Id.* at 324, 1565.

1. THE NINTH CIRCUIT HAS ALSO HELD THAT THE RLA DOES NOT PREEMPT STATE CLAIMS STEMMING FROM A STATUTE RATHER THAN FROM THE CBA

On August 26, 1991, a different panel of the Ninth Circuit Court of Appeals handed down *Polich v. Burlington Northern, Inc; Burlington Northern Railroad Company,* 91 C.D.O.S. 6816 (9th Cir. 1991) (App. 12). In *Polich* the appellants brought claims under a Montana statute which awarded damages for devaluation of an employee's property if devaluation was caused by the closing of a railroad "division point or terminal. . . . " Mont. Code Ann. 69-14-1002, 1989. Appellees argued that the statutory terms "division point" and "terminal" required reference to the CBA. The court of appeals disagreed on the ground that the coverage of the statute would depend on the statute's definition of those terms.[2] The court said, "The fact that a CBA provides some particular protections is not relevant to a claim based on a totally different type of protection afforded under a statute." *Id.* (App. 20)

---

[2] In fact, neither Mont. Code Ann. 69-14-1002, nor the statutory scheme in which it is contained expressly defines "division point" or "terminal." Montana Code Annotated, 1989.

2. THE SUPREME COURT SHOULD CLARIFY THE USE OF THE TERM "INTERPRETATION" AS USED IN THE RLA AND AS USED IN THE LMRA

In spite of Respondent's acknowledgement of *Puchert*, and in apparent contradiction to that decision, Respondent argues that mere "reference" to the CBA is sufficient for preemption under the RLA, regardless of the source of the right in question and regardless of whether the claim could be the subject of a grievance under the CBA.

Respondent argues that "interpretation" of the CBA has a different meaning under the RLA than it does under the LMRA. Respondent states that "interpretation" as used in the LMRA is "tantamount to requiring an analysis or study of contractual terms to ascertain their meaning or effect." (p.15, ftnt.21), but contends that as used in the RLA it means mere "reference." (p.15, ftnt.21.)

In this case, in analyzing United's "deceit" pursuant to Cal. Civ. Code Sections 1709 and 1710 (Pet. App.30) the trier of fact will look at United's suggestion, assertion or suppression of a fact which United knew, believed or should have known not to be true. Or the court will look for a promise made without any intention of performing it. Similar claims have recently been found not to require "interpretation" of the CBA and not preempted by the LMRA. *See, Berda v. CBS Inc.* 881 F.2d 20 (3rd Cir. 1989), *cert. denied* ___ U.S. ___, 110 S.Ct. 879 (1990) (plaintiff need only establish that CBS' agents promised he

would not be laid off for a reasonable period of time although they knew or were reckless in not knowing that CBS was planning a reduction in force that would affect him), *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1959 (1990), (examination of the terms of a severance agreement in order to determine what the *truthful* representations should have been, established relevance of the agreement but not necessarily substantial dependence for preemption purposes), *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 481 U.S. 1049, 107 S.Ct. 3242, (Proof that Ford fraudulently induced employment by misrepresenting that new hires would not be "bumped" by "preferential hirees" does not depend on the existence of any contractual relationship nor do the standards for judging fraudulent misconduct derive from any contractually established expectations of the parties).

Application of such vastly different definition to the word "interpretation" when analyzing the preemptive effect of two federal statutes often used analogously, requires clarification by this Court.

B. IT IS UNITED'S CONDUCT WHICH THREATENS THE FEDERAL LABOR SCHEME, NOT PETITIONER'S CLAIM FOR DAMAGES

Petitioner has argued that her claims should not be preempted by the RLA because she was not an employee under the Act nor was she a party to the CBA at the time the misrepresentations were made. Respondent opposes with the statement,

> . . . Petitioner cannot deny that if United indeed made misrepresentations, those misrepresentations would form the terms of a separate agreement different from those of the collective bargaining agreement. Under these circumstances, the threat to the federal labor scheme is clear and cannot be permitted, regardless of Petitioner's employment status at the time of the alleged misrepresentations. (p. 22-23).

Again, Respondent has confirmed the very argument in support of certiorari. It is United Airlines, the employer, who violated the federal labor scheme by offering a "separate agreement," and using that agreement to induce Petitioner and others away from their employment with Pan Am.[3] United enforced that separate agreement by hiring Petitioner Melanson and others, in spite of the fact that they did not meet the weight requirements, and allowing them to fly for several months. United then unilaterally rescinded that separate agreement, when it served United's purposes to do so.

The federal labor scheme was violated before Petitioner brought this action. To allow United to benefit

---

[3] It should be noted that Petitioner had no reason to be aware of the fact that this was an improper "separate agreement." A new agreement was being negotiated and the terms of that new agreement were not communicated to Pan Am transferees. The record at this point does not indicate whether the Association of Flight Attendants, (AFA) which represents United flight attendants, was aware of these misrepresentations, but it has been established that AFA was not in communication with the Pan Am flight attendants being recruited by United. Unrepresented prospective employees should not be held to a higher standard of knowledge of the intricacies of federal labor law than is the prospective employer.

from that violation by blocking any liability for its conduct is to permit United and other carriers to make a mockery of that federal labor scheme. Petitioner Melanson's claims are no threat to the federal labor scheme because she does not seek to enforce that "separate agreement." She is prepared to abide by the CBA. However, she seeks damages for her reliance on *United's* violations of that labor scheme.

C. RESPONDENT'S ARGUMENT AGAINST CERTIORARI IS BASED ON MISCHARACTERIZATION OF PETITIONER'S CLAIMS

The thrust of United's argument in opposition to certiorari is based on giving petitioner's claims and existing case law the very broadest possible reading, without acknowledging some very critical distinctions. Again, however, respondent's argument corroborates the importance of granting certiorari in this case, so that this Court may address some of those distinctions.

1. THIS CASE CANNOT BE COMPARED TO *GROTE V. TRANS WORLD AIRLINES, INC.*

United inaptly compares this case to *Grote v. Trans World Airlines, Inc.*, 901 F.2d 1307 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 386 (1990). Contrary to respondent's contention, these two cases do not raise identical issues. Grote brought an action in the United States District Court for the southern District of California. He alleged breach of duty of good faith and fair dealing as well as intentional and negligent infliction of

emotional distress and defamation, all of which were in response to an alleged wrongful termination. *Id.* 1309.

In California, breach of the duty of good faith and fair dealing is a tort claim based on breach of the terms of a contract. *Foley v. Interactive Data Corp.*, 47 C3d 654, 254 CR 211 (1988). Thus, Grote's claims would require reference to "interpretation" of the terms of the CBA and could not be "independent" of the CBA. As this Court decided in *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. at 324, 92 S.Ct. at 1565 (1972) when the only source of the right not to be terminated is the CBA, it is essentially a question of contract interpretation.

The contrast to this case is obvious. Petitioner Melanson's claims are not based on any breach of the terms of the CBA. The Ninth Circuit held that her grievance, which did allege misapplication of the CBA, was a different issue. Melanson's claims would require no more than a "tangential" reference to the CBA. *See, Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, at 211, 105 S.Ct. 1904, at 1911 (1985).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDITH J. BENAY
Counsel of Record for Petitioner
345 Franklin Street
San Francisco, California 94102
Telephone: (415) 241-7286

George K. PUCHERT, Appellant,

v.

Joshua C. AGSALUD, in his capacity as Director of the State of Hawaii, Department of Labor and Industrial Relations; Pan American World Airways, Appellees,

No. 8908.

Supreme Court of Hawaii.

Jan. 27, 1984.

* * *

WAKATSUKI, Justice.

This is an appeal of the first circuit court's affirmance of the director of labor and industrial relations' dismissal of Appellant's complaint of unlawful discharge from employment pursuant to Hawaii Revised Statutes (HRS) § 378-32(2). The complaint was dismissed for untimely filing under HRS § 378-33(b).

The primary issue involves the construction of a statute, HRS § 378-33. As construed by the director and the lower court, HRS § 378-33(b) requires the filing of a complaint of unlawful discharge from employment only after an employee is able to return to his former job, and not any sooner. We hold that such a construction of the statute does not comport with the legislative purpose and intent of HRS §§ 378-32 and 378-33, and therefore, we reverse.

The parties involved in this action are (1) Appellant Puchert, the employee who filed the complaint of unlawful discharge; (2) Appellee Pan American World Airways (Pan Am), the employer against whom the complaint was

filed; and (3) Appellee Agsalud, Director of the State Department of Labor and Industrial Relations (Director) who dismissed Puchert's complaint.

At the time of his alleged unlawful discharge, Puchert had been employed for several years as a port steward by Pan Am. On several occasions, Puchert had suffered back injuries at work, the last of which occurred on December 30, 1978. Due to this December 30th injury, Puchert did not return to work until January 6, 1979, at which time he was allowed to do only light duty work upon the instructions of his chiropractor. By letter of January 9, 1979, Puchert was discharged by Pan Am. The basis for this discharge was Puchert's physical limitations in performing his work.

On January 14, 1979, Puchert, through his union (Transport Workers Union of America), filed a grievance with Pan Am as to his discharge pursuant to a collective bargaining agreement between Pan Am and the Transport Workers Union. The grievance was brought before the Board of adjustment for arbitration on February 7, 1979. The Board's decision modified Puchert's dismissal to a medical leave of absence not to exceed six months, and further, required that Puchert, during that six-month period, obtain a medical report from a physician approved by Travelers Insurance Company and a permanent disability rating from the State Department of Labor and Industrial Relations (department) Workers Compensation Division which would not restrict him from performing any of the duties of a port steward. The decision further stated that, upon his return to work, Puchert would be required to comply with Pan Am's attendance standards.

On June 1, 1979 Puchert filed a complaint, pursuant to HRS § 378-32, for unlawful discharge against Pan Am with the department's Enforcement Division. Prior to filing his complaint, Puchert was advised by department personnel to wait until he was released by his doctor to return to work but this advice was not heeded and the complaint was filed.

Five days prior to the expiration of Puchert's medical leave of absence, as granted by the Board of Adjustment, Pan Am asked Puchert to advise the company of his intention to return to work.

On August 1, 1979, Puchert's chiropractor submitted a letter to the department stating that Puchert was still only available for light duty work. However, on August 6, 1979, Puchert was able to obtain a letter from the same chiropractor releasing him for regular duty "on a trial basis."

The facts are not clear whether Puchert reported for duty on August 7, 1979, and was then discharged, or whether he received notification of his termination in some other manner. Nonetheless, Pan Am contends that on August 7, 1979, Puchert had not complied with the terms of the Board of Adjustment's decision, and therefore he had no right to return to work.

Neither on August 7, 1979, nor at any time thereafter did Puchert file another complaint with the department for unlawful discharge.

In June, 1980, a year after Puchert filed his complaint for unlawful discharge with the department, and ten months from the date he was allegedly able to return to

work as a port steward, the department held hearings on Puchert's complaint of June 1, 1979. Thereafter, the hearing officer recommended that the complaint be dismissed for lack of jurisdiction due to the untimely filing of the complaint. The hearing officer concluded that under HRS § 378-33, the only time Puchert could file a complaint for unlawful discharge was within thirty days after his January 9, 1979 discharge, or within thirty days from the date he was able to return to work. Director Agsalud concurred with the hearing officer's recommended decision. Puchert appealed, and the circuit court affirmed the director's decision.

I.

Before proceeding to an analysis of HRS § 378-33, we address Pan Am's assertion that federal pre-emption applies in view of the federal labor law which provides that where a collective bargaining agreement provides for a resolution of a dispute of this nature through grievance and arbitration proceedings, this court lacks jurisdiction. Although federal preemption was not the basis upon which the director and the circuit court dismissed Puchert's complaint, the question of a court's jurisdiction cannot be disregarded. *State v. Johnston*, 63 Haw. 9, 11, 619 P.2d 1076, 1077 (1980).

The doctrine of labor law pre-emption concerns the extent to which congress has placed implicit limits on the permissible scope of state regulation of activity touching upon labor management relations. *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 527, 99 S.Ct. 1328, 1334, 59 L.Ed.2d 553 (1979).

The Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, which applies in this case, provides for compulsory arbitration to settle "minor disputes". *Andrews v. Louisville and Nashville R.R. Co.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972), *International Assn. of Machinists, AFL-CIO v. Central Airlines*, 372 U.S. 682, 83 S.Ct. 956, 10 L.Ed.2d 67 (1963), *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189 (9th Cir.1983). A "minor dispute" exists where a collective bargaining agreement provides a remedy for an alleged wrongful act. *Andrews, supra; Schroeder, supra; REA Express, Inc. v. Brotherhood of Ry. Airline and Steamship Clerks, etc.*, 459 F.2d 226 (5th Cir.1972).

Cases holding that state law claims are pre-empted by the RLA are clearly distinguishable. The complaints filed in those cases constituted state law claims that were non-existent but for the collective bargaining agreement which provided remedies for such claims, or the state law claims were identical to the contractual claims provided for in the collective bargaining agreement. *E.g., Andrews v. Louisville and Nashville RR Co., supra,* (state law claim of unlawful discharge depended solely on contract right not to be discharged); *Schroeder v. Trans World Airlines, Inc., supra* (complaint of unlawful business practices in violation of California statutes was actually a complaint of wrongful demotion under the collective bargaining contract); *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir.1983) (complaints alleging intentional infliction of emotional distress referred to rights covered or substantially related to the collective bargaining agreement); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.1978) (emotional distress incident of discharge from employment rather than result of alleged

conspiracy); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983) (state claim raised identical to claim employee would have made had he pursued his grievance through channels specified in the collective bargaining agreement).

Puchert's complaint, however, does not constitute a "minor dispute" subject to mandatory arbitration under the RLA. The resolution of the dispute in question does not hinge on the application or interpretation of the collective bargaining agreement between Pan Am and Puchert's union. Puchert complains of a violation of his right not to be discharged from his employment solely because he suffered from a work injury compensable under the state's worker's compensation law. This right finds its source not in the collective bargaining agreement between Pan Am and Puchert's union, but in the statute. *See Air Line Pilots Assn. v. Northwest Airlines, Inc.*, 627 F.2d 272 (D.C.Cir.1980).

If Puchert were not permitted to pursue his claim of wrongful discharge under HRS § 378-32 before the state agency and courts, he would have no forum in which to press his claim. An arbitrator may only arbitrate disputes arising under the provisions of the collective bargaining agreement, 51A *C.J.S.* Labor Relations § 429 (1967), and is limited to the interpretation and application of provisions contained within the agreement. *United Steelworkers of America v. Enterprise Wheel*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). The arbitrator – in this case the Board of Adjustment – would have no authority to consider Puchert's statutory claim. *See Air Line Pilots Assn. v. Northwest Airlines, supra; Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974).

Other employment relations cases brought under federal statutes have held that where the right upon which the complaint is based is statutory, courts are not denied jurisdiction merely because a collective bargaining agreement exists which provides for grievance and arbitration procedures. *Alexander v. Gardner-Denver Co., supra; Harris v. Norfolk and Western Railway Co.*, 616 F.2d 377 (8th Cir. 1980) (race discrimination suits brought under Title VII of the Civil Rights Act of 1964); *Barrentine v. Arkansas Best Freight System*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981) (wage dispute under Fair Labor Standards Act); *Airline Pilots Assn. v. Northwest Airlines, supra* (violation of ERISA fiduciary standards in managing collectively bargained pension plan); *Johnson v. American Airlines, Inc.*, 487 F.Supp. 1343 (N.D.Tex.1980) (suit brought under the Age Discrimination in Employment Act).

State court jurisdiction has similarly been upheld where it was clear that the source of the right alleged to have been violated was state statute rather than the collective bargaining agreement. *Bald v. RCA Alascom*, 569 P.2d 1328 (Alaska 1977) (religious discrimination in violation of state antidiscrimination statute); *Franklin Manufacturing Co. v. Iowa Civil Rights Commission*, 270 N.W.2d 829 (Iowa 1978) (employer's group insurance plan violative of state sex discrimination laws); *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981), and *Vaughn v. Pacific Northwest Bell Telephone Co.*, 289 Or. 73, 611 P.2d 281 (1980) (violation of state statute prohibiting discharge for filing workers compensation claims).

Inasmuch as Puchert's claim of unlawful discharge has its source in state statute and his claim is not identical to any claim he may make under the collective bargaining

agreement, we hold that Puchert is not limited to pursuing remedies in the grievance and arbitration procedures established under the collective bargaining agreement.

Although we find that Puchert's state law claim does not interfere with the provisions of the collective bargaining agreement, we must also consider whether application of state law in this case interferes with the scheme of the RLA.

This Court recently reviewed the question of preemption in the area of labor law in *Gouveia v. Napili Kai, Ltd.*, 65 Haw. 189, 649 P.2d 1119 (1982). There we concluded that the National Labor Relations Act (NLRA) bestowed exclusive jurisdiction to the National Labor Relations Board on certain matters, *Id.* at 193-194, 649 P.2d 1119, quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). Yet congress did not wholly pre-empt state regulation. *Id.* 65 Haw. at 194, 649 P.2d 1119, quoting *Garner v. Teamsters Union*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953). States retained the "power to regulate where the activity regulated was merely a peripheral concern of the [NLRA]." and "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that in the absence of compeling congressional direction, . . . [it] could not infer that congress had deprived the states of power to act." *Id.*, 65 Haw. at 195, 649 P.2d 1119, quoting *San Diego Bldg. Trades Council v. Garmon, supra.*

Gourcia and the cases cited therein examined the conflict between state law and the NLRA. This case, on the other hand, involves federal-state relations under the

RLA but the problems and considerations are analogous, *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969), and courts have applied standards adopted in NLRA pre-emption cases to RLA cases. *E.g., Beers v. Southern Pacific Transportation Company, supra; Magnuson v. Burlington Northern, Inc., supra; Majors v. U.S. Air Inc.*, 525 F.Supp. 853 (D.Md.1981); *Jackson v. Consolidated Rail Corp., supra.*

The precise issue of whether state statutes prohibiting unlawful discharges for injuries compensable under workers' compensation laws withstands federal pre-emption was presented in *Peabody Galion v. Dollar, supra,* and *Vaughn v. Pacific Northwest Bell Co., supra.*

The Oklahoma statute examined in *Peabody Galion* and the Oregon statute in *Vaughn* are substantially similar to HRS § 378-32. Both the Tenth Circuit Court of Appeals[1] and the Oregon Supreme Court, respectively, concluded that the state statutes are not pre-empted by federal labor laws. Both courts found that the subject of the respective statutes was of peripheral concern to the federal laws because it had nothing to do with collective bargaining or union organization. *Peabody Galion,* 666 F.2d at 1316; *Vaughn,* 289 Or. at 82, 611 P.2d at 287. Additionally, workers' compensation "is pre-eminently a matter of state concern," *Peabody Galion,* 666 F.2d at 1316, and the "state has a substantial interest in protecting the integrity of its workers' compensation system." *Vaughn,* 289 Or. at 82, 611 P.2d at 287.

---

[1] *Peabody Galion* came before the Tenth Circuit Court of Appeals as a diversity action.

We agree with the analysis of both the Tenth Circuit and the Oregon Supreme Court in these cases. While both cases were decided in the context of the NLRA, we find the same standard applicable here and the consideration analogous. We, therefore, hold that HRS § 378-32, is not pre-empted by the RLA in this case and that the department of labor and the state courts have jurisdiction to hear Puchert's complaint. The source of the right on which Puchert bases his complaint is state statute, not the collective bargaining agreement. His claim of discrimination in violation of the statute could not be considered by the Adjustment Board whose authority extends only to interpretation or application of the collective bargaining agreement. Thus, Puchert's only means of having his cause of action heard is through the administrative and judicial procedures prescribed by state statute. Furthermore, the state statute on which Puchert relies in advancing his unlawful discharge claim is not pre-empted by the RLA. The state has a substantial interest in the welfare of workers who are injured in the course of their employment and to see that they are not penalized for pursuing remedies granted to them by statute. Such regulation by the state does not interfere with the scheme and purposes of the RLA.

* * *

(Section II, analysis of HRS Sections 378-33(b) has been omitted.)

CONCLUSION

We hold that the circuit court erred in affirming the director's decision dismissing Puchert's complaint for

untimely filing. Further, we hold that Puchert's statutory claim is not pre-empted by the collective bargaining agreement or federal labor laws, nor is his claim barred by the doctrine of laches. We, therefore, reverse and remand Puchert's complaint to the department for a hearing on the merits.

Cite as 91 C.D.O.S. 6816

VICTOR J. POLICH, et al., Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN, INC.; BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware Corporation, Defendants-Appellees.

GOODWIN, Circuit Judge:

Following a series of mergers and reorganizations, the Burlington Northern Railroad Company closed its railroad operations in Livingston, Montana. Appellants, who include both former Livingston employees and spouses of former employees, sued the Burlington Northern Railroad Company and Burlington Northern, Inc. (collectively, BN) for damages arising out of the closure. They appeal the dismissal of the action for want of subject matter jurisdiction. We affirm in part and reverse in part.

The complaint alleged that BN breached its promise to employees and their spouses to keep its Livingston railroad facilities open and operational, and committed actual and constructive fraud in closing the facilities. The complaint alleged that BN made these promises during the course of two different corporate reorganizations.

The first incident allegedly occurred in 1970, when Burlington Northern, Inc. (the predecessor to the current BNRC) was created as a result of an Interstate Commerce Commission-approved merger among several railroads. The complaint alleged that at the time of this merger,

railroad officials made public assurances that railroad facilities in Livingston would never close.

The second set of promises was allegedly made in 1980 and 1981. In 1980, BNI merged with the St. Louis-San Francisco Railway Company. In 1981, BNI changed its name to Burlington Northern Railroad Company (BNRC) and took control of all railroad operations and assets. BNI was reformed as a holding company, which now includes other businesses in addition to railroads. The complaint alleged that BNRC and BNI officials made public assurances that railroad operations in Livingston would not be adversely affected by either the St. Louis-San Francisco merger or the 1981 reorganization. The complaint further alleged that BN intended that the plaintiffs would rely on these promises and that the plaintiffs did so rely.

Defendants moved to dismiss, or for summary judgment, on the ground that plaintiffs' claims were preempted by the Interstate commerce Act and the Railway Labor Act. Plaintiffs thereafter moved to file a third amended complaint, which included allegations that BN violated section 69-14-1002 of the Montana Code. This statute purports to require railroads to compensate workers when the value of their homes is destroyed by the closure of a railroad terminal or division point. The district court denied the motion and dismissed the action.

I. *Railway Labor Act Preemption*

Appellants contend that their state law claims were not preempted by the Railway Labor Act (RLA), 46 U.S.C. §§ 151-163 (1988). They argue that their state law claims neither involve nor implicate any collective bargaining

agreement, and hence do not constitute a "minor dispute" which would be preempted by the RLA.

This court reviews *de novo* the district court's dismissal for lack of subject matter jurisdiction. *FDIC v. Nichols*, 885 F.2d 633, 635 (9th Cir. 1989). We may affirm on any ground finding support in the record. See *Smith v. Block*, 784 F.2d 993, 996 n.4 (9th Cir. 1986). We may affirm even if the district court relied on the wrong grounds or the wrong reasoning. See *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir. 1985); *Alcaraz v. Block*, 746 F.2d 593, 602 (9th Cir. 1984).

A. *Employee Claims*

Under the RLA, 45 U.S.C. §§ 152-153, employer-employee disputes classified as "minor disputes" are "subject to compulsory . . . arbitration before the National Railroad Adjustment Board . . . or before an adjustment board established by the employer and the unions representing the employees." *Consolidated Rail Corp. v. Railway Labor Exec. Ass'n*, 491 U.S. 299, 303-04 (1989). The district court lacks subject matter jurisdiction over "minor disputes." *Daniels v. Burlington Northern Railroad Co.*, 916 F.2d 568, 570 (9th Cir. 1990).

The district court held that a claim was a "minor dispute" subject to the exclusive jurisdiction of the RLA if it was "founded on some incident of the employment relationship," whether or not the claim was covered by a collective bargaining agreement. Appellants argue that the district court applied the wrong standard, and that preemption is proper only if the dispute involves the

application or interpretation of an existing collective bargaining agreement. This argument does not assist appellants' cause. Even if preemption occurs only when resolution of the dispute involves the interpretation of a collective bargaining agreement, we have concluded that the employee-appellants' claims are preempted.

Appellants argued that their claims were not preempted because appellants would seek to prove that the promises at issue were outside the scope of the collective bargaining agreement (CBA). However, in determining whether a dispute is preempted, the plaintiff's pleadings and offers of proof are not controlling. The claim is also preempted if the railroad seeks to defend its conduct on the ground that the conduct was justified by the terms of the CBA. *See Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 29, 305-07 (1989).

We will not find preemption if the railroad's assertion regarding the CBA is "frivolous or obviously insubstantial." *Id.* at 307. But the railroad's burden in establishing preemption is "relatively light," and we will find preemption if the employer's conduct is "arguably justified" by the terms of the CBA. See *id.* BN stated that it intended to defend its actions on the ground that those actions were permitted by the CBA, and that based on that proposed defense, appellants' claims were preempted.

The district court had before it the affidavit of Maxine Timberman, BNRC Assistant Director of Labor Relations. Timberman's affidavit, which was never

contradicted, states that all employee-plaintiffs were covered by labor protective or collective bargaining agreements.[1] Each union had a separate agreement. Timberman attached one sample agreement, from 1964, which she swore contained provisions typical of each union's agreement. Timberman further swore that the closure of the Livingston facilities was conducted in accordance with those agreements.

Ms. Timberman attached copies of the letters notifying employee unions that work would be transferred from Livingston. She stated that "[t]he notices were issued in compliance with the Schedule Agreement and constituted the maximum notice required under the various protective arrangements for each of the involved crafts." She further swore that all unions with affected members negotiated with BN about matters such as "seniority, job protection, moving expenses and all matters relating to employment termination or transfer."

The witness further swore that all of the collective bargaining agreements and protective agreements contained arbitration provisions. Appellants have never denied the existence of the coverage of the collective bargaining agreements, and the court had the right to accept the undisputed affidavit establishing that all employee-plaintiffs were covered by collective bargaining agreements.

---

[1] Timberman was able to identify the dates of service and the union membership of almost all employee-plaintiffs. She was unable to locate the records of four employee-plaintiffs, but asserted her belief that those four were also union members covered by collective bargaining agreements.

Based on our examination of the 1964 agreement, we hold that BN's conduct was "arguably justified" by the CBA. The 1964 agreement specified what protections would be afforded to employees in the event that facilities were abandoned. We do not need to decide whether the agreement did in fact justify BN's conduct. We hold only that appellees have made a non-frivolous argument that their conduct was so justified; under *Consolidated Rail*, this is sufficient to cause the employee-appellants' claims to be preempted by the RLA.

Appellants argue that at the time the promises were made, no collective bargaining agreements could have existed between the appellee corporations and the employee-appellants, because the appellee corporations did not exist. However, appellants also insist that under Montana law, the defendant corporations are liable for the promises of their predecessor corporations. Montana law provides that following a merger, the surviving corporation "possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations." Mont. Code Ann. § 35-1-806(2)(d) (1989). In addition, the surviving corporation "shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated." *Id.* § 35-1-806(2)(e). Thus, BNRC and BNI are responsible for promises made by their predecessors. In addition, they assume the rights stemming from any collective bargaining agreements made with their predecessors.

B. *Spouse Claims*

"Minor disputes" preempted by the RLA include " '[a]ll disputes between a carrier or carriers and its or their *employees*. . . . ' " *Daniels*, 916 F.2d at 570 (quoting 45 U.S.C. § 152 Second) (emphasis in original). Appellants contend that because RLA preemption applies only to employees, it does not apply to those appellants who are spouses of employees and are not employees themselves. Appellees argue that the spouses' claims are entirely derivative of the employees' claims, and so the spouses claims are also preempted.

The spouses would have an independent action against BN if they could show, *inter alia*, that BN knowingly made a false representation to them, that BN intended that they rely on the false representation, that they had a right to rely on it, that they did so rely, and that they suffered damage as a result of that reliance. See *Wiberg v. 17 Bar, Inc.*, 241 Mont. 490, 788 P.2d 292, 295 (Mont. 1990) (outlining the requirements for proving fraud under Montana law). By contrast, the spouse-appellants' claims are derivative if it was only the employees who relied on the promises, and if the spouses' claims are for damages they sustained when the employees lost their jobs.

The complaint alleged various types of damages, including "family separations and loss of jobs, homes, property, opportunity, security and emotional stability, in addition to losing their opportunity to object to the mergers and/or foundation of the holding company." The complaint fails to show any way in which the spouses were damaged as a result of their own independent

reliance on BN's alleged promises, with the possible exception of losing the opportunity to object to the mergers. Rather, the claims of the spouses are based on damages they suffered because the employees lost their jobs. Therefore, those claims are derivative of the employees' claims, and the district court's jurisdiction over those claims was preempted by the RLA to the same extent it was preempted for the employees' claims. To the extent that the spouse appellants seek to show independent reliance based on giving up their opportunities to object to the mergers, that claim is preempted by the jurisdiction of the Interstate Commerce Commission, as discussed below.

We find no other allegations in the complaint of independent reliance by the spouses. Therefore, we dismiss the action of the spouse appellants for failure to state a claim upon which relief could be granted. See Fed. R. Civ. P. 12(b)(6).

C. *Statutory Claim*

The district court refused to allow appellants to file a third amended complaint, which appellants sought to add a claim based on section 69-14-1002 of the Montana Code. This statute provides that if a railroad company operating in Montana moves a division point or terminal, it shall be liable "to any employee of such railroad or railway company for any damage sustained by such employee by reason of any decrease in value of any real property actually occupied by such employee as his place of residence, which decreased in value shall be caused by

reason of the removal of such division point or terminal. . . . " Mont. Code Ann. 69-14-1002 (1989). Appellants filed their original complaint based on the railroad's closure of shops located in Livingston. After appellants had filed this complaint, the railroad allegedly took the further step of closing the Livingston terminal. At that point, appellants sought to amend their complaint to state a claim under the Montana statute.

Appellees argue that this claim is preempted, because "[n]o sense can be made of the statutory terms 'division point' or 'terminal' without reference to the collective bargaining agreement." However, the collective bargaining agreement is not relevant to this claim. The claim is based on the terms of the statute. The coverage of the statute would depend on the statute's definition of a "terminal," not the CBA's. Appellees have not made any other argument about why the statutory claim should be preempted, nor have we found any basis for preemption based on our review of the 1964 collective bargaining agreement.

The agreement states that the purpose of the section on employee protection is "to afford protective benefits for employees who are displaced or deprived of employment as a result of changes in the operations of the carrier. . . . " The agreement nowhere states that the protections stated in the CBA are exclusive of any protections that might be provided under state law or that employees have agreed to give up any protections to which they are entitled under state law. Indeed, statutes often provide protections for employees beyond those provided in CBAs. See, *e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (holding that petitioner's remedy

under Title VII of the Civil Rights Act was in addition to remedies available under the collective bargaining agreement in force between his employer and his union). The fact that a CBA provides some particular protections is not relevant to a claim based on a totally different type of protection afforded under a statute.

Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment. *Kelson v. City of Springfield*, 767 F.2d 651 (9th Cir. 1985). Appellants have sated a cause of action pursuant to the Montana statute, and the amendment should have been permitted. If the statute is invalid as a burden on commerce, or is subject to some other defense, those questions can be resolved in the trial court.

D. *Status of Holding Company*

Finally, appellants contend that because of BNI's status as a holding company, BNI is not a railroad carrier subject to the provisions of the Railway Labor Act, including RLA preemption. If BNI is merely a holding company, then appellants have failed to explain how BNI caused the closure of the Livingston facilities and have sued the wrong defendant.

II. *Interstate Commerce Act Preemption*

BN argues, in the alternative, that appellant's claims are preempted under the Interstate Commerce Act (ICA), 49 U.S.C. §§ 10101-11917 (1988). Because the district court found all claims to be preempted by the RLA, it did not

reach this issue, and appellants declines to address the issue of ICA preemption in their briefs.

Because we hold that one of appellants' claims is not preempted by the RLA, and because we may affirm on any ground finding support in the record, see *Smith v. Block*, 784 F.2d at 996 n.4, we turn to the issue of ICA preemption.

A railroad carrier may not merge with another carrier without the approval and authorization of the ICC. 49 U.S.C. § 11343(a)(1) (1988); *Kraus v. Santa Fe Southern Pacific Co.*, 878 F.2d 1193, 1197 (9th Cir. 1989), cert. dismissed, 110 S. Ct. 1329 (1990). The Interstate Commerce Commission has exclusive jurisdiction over such mergers. 49 U.S.C. § 11341(a) (1988). It is undisputed that the ICC approved both mergers at issue here.

In their second amended complaint, appellants alleged that BN officials made public assurances that the Livingston railroad facilities would never close if the 1970 and the BNRC-St. Louis/San Francisco Railway Company mergers were approved. Appellants further alleged that the 1970 merger was approved as a direct result of these promises. Finally, appellants alleged that BN was under a continuing duty to disclose to appellants the effect of the proposed mergers on railroad facilities in Livingston.

The complaint alleged that the plaintiffs, including the spouse plaintiffs, lost their opportunity to object to the mergers because of their reliance on the railroad's promises. To the extent that appellants' claims stem from alleged fraud in connection with the ICC's approval of the mergers, the ICC has exclusive jurisdiction. *Kraus*, 878 F.2d 1198 (district court lacked jurisdiction over plaintiff

railroad employees' claims arising out of allegedly unauthorized merger because ICC has exclusive jurisdiction over enforcement of the merger provisions of the ICA). Thus, the spouse appellants cannot establish jurisdiction based on a claim that they independently relied on BN's promises by giving up their opportunities to object to the mergers.

On the other hand, to the extent that violation of ICA merger provisions is not an essential element of appellants' state law claims, these claims are not barred. *Id.* at 1199-1200. Appellants' claim under the Montana statute has no connection with violation of any provisions of a merger. The statute provides that employees should be compensated for the loss in value of their homes any time a railroad closes a terminal in the state, regardless of the reason for the closure. Appellants do not need to show any wrongdoing on the part of the railroad to recover under this statute, and arguments regarding approval of the merger have no relevance to this claim. Thus, this claim is not preempted by jurisdiction of the ICC.

CONCLUSION

Appellants' should be permitted to amend their complaint to state a cause of action under section 69-14-1002 of the Montana Code. We affirm the judgment dismissing appellants' other claims. Each party will pay its own costs on this appeal.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.